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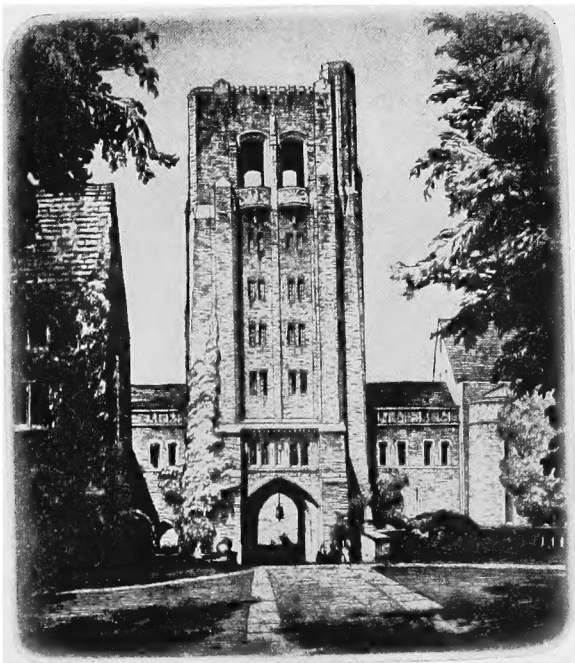
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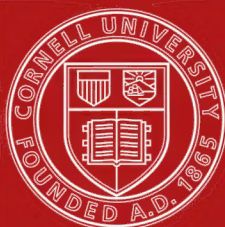


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Procedure

IN

Interstate Commerce Cases

With Illustrative Precedents and Forms

BY

JOHN B. DAISH, A.B., LL.M.

WASHINGTON

W. H. LOWDERMILK & COMPANY

1909

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With filial devotion
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PREFACE

The enactment, in 1887, of the original act to regulate commerce marked an epoch in the history of the Federal control over interstate and foreign commerce. The Congress had not theretofore passed any general legislation under the commerce clause of the Constitution, although the statute books contained certain provisions¹ dependent thereon. Since that time, however, a number of statutes having various objects in view have been passed under the commerce power of the Constitution. The year 1887 may be taken as the beginning by the Federal Government of the supervision and control over rates of carriers engaged in interstate commerce.

The causes of complaint against the then existing railway management were many but they centered chiefly around what was called "discrimination," a term which has since had under judicial decisions a different meaning as used in the act to regulate commerce. The causes which led up to the passage of the act are referred to in Chapter I.

That many of these causes of complaint have been corrected by the original and supplemental acts must be admitted; some of the inequalities of that period and others, however, have continued. For the purpose of correcting these, other acts have been passed and the Interstate Commerce Commission has been made the governmental agency for the determination of questions relating to transportation, to supervise carriers, and for bringing about a correction of rates and practices, if in violation of the statute.

The Interstate Commerce Commission has consisted of earnest and conscientious men of high ability; it has striven, to the extent the act to regulate commerce would permit, to bring about a correction of the violations of the law, a better understanding of the rights of parties and to secure, in accordance with the duty imposed on it by section 21 of the act, information and data valuable in the determination of questions connected with the regulation of commerce and to recommend such additional legislation as it might deem proper. The Commission is, perhaps, constitutionally speaking, an anomalous body in our Federal organization, but the benefits wrought by it are apparent. In the exercise of its quasijudicial duties there has been rendered a series of decisions, from which may be drawn the proper prin-

¹ See note 1, p. 3.

ciples of transportation; as a result of its administrative, supervisory, and regulatory powers great good has been accomplished; and through the medium of general investigations many needed reforms have been brought about by the exercise of the Commission's inquisitorial powers, probably much curtailed by the recent decision in *Harriman v. U. S.*, No. 315, Supreme Court, October Term, 1908.

While the act of February 4, 1887 (24 Stat. L., 379) was the first law of the Congress having for its purpose the amelioration of existing transportation conditions by requiring reasonableness of charges for transportation and by prohibiting discriminations, the provisions thereof were not entirely original. The common law, the previous legislation of Great Britain and the decisions of the courts thereon, and the analogous laws of several of the States² already existed. These enactments, having substantially the same purposes, served as models or guides for the Congress. It, therefore, had the benefit of this previous experience.

The act to regulate commerce is, in part, in derogation, and, in part, in affirmation of the common law. It attempts, and the purpose of the several amendments has been to perfect the attempt, to place those who are engaged as carriers of interstate commerce by rail under the duties and obligations which are imposed upon common carriers by the common law; namely, to serve all, with adequate facilities, for a reasonable compensation and without discrimination. These obligations, modified only to such extent as is made necessary by our economic development, have been the foundation of the legislative enactments.

In addition to the original act to regulate commerce there have been a considerable number of amendments, and the statute itself has received interpretation and construction at the hands of the Commission and the courts. To the layman, and at times to the practitioner, the act and the decisions taken together are bewildering. As the subject-matter of cases deals most intimately with the every-day business transactions and affects seriously the commercial fabric such confusion is lamentable. A number of well-written works dealing with the substantive law are available for the business man or the practitioner. Although twenty years have passed since the statute was enacted no one heretofore has attempted to delineate the procedure which is peculiarly applicable to cases involving interstate commerce, either under the act to regulate commerce or arising under general law.

The Interstate Commerce Commission, it is true, has provided rules of practice but they are necessarily brief. The Commission has so framed these rules as to make the way easy for the complaining user

² For list of States having railway regulation laws in 1886, see Chapter I. The provisions of several State laws were considered in *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479).

of transportation facilities, often at the risk of not advising the defendant carrier of the specific violation of which it is charged, and the same difficulty frequently confronts a complainant in ascertaining before the hearing the real and complete defense of the carrier.

From time to time customs have grown up, rulings have been made, and matters have been settled. Some of these have been committed to writing while others are known only to those in active practice before the Commission. The rules applicable to pleading, to evidence, and to practice have not reached such a stage of development that in each and every instance it can be safely stated what is the correct method. The practice before the Commission, in other words, has not yet made such progress that it has become definitely settled. One of the purposes of this work has been to assist in crystallizing the rules applicable to procedure before the Commission and if it shall even in part serve this purpose the author will be duly rewarded.

The pleadings, the evidence, and the practice are of the simplest form possible; no technicalities are permitted. Yet such laxity, while it has its commendable features, often leads into errors more serious than one would suppose. For instance, failure to have proper parties may result in the loss of important relief; want of proof, legal in its nature, may prevent reparation. Thus, although the practitioner, and often the layman, may permit himself to plead or conduct a case in an informal way and perhaps carelessly, the result is generally appropriate to such a course. It behooves one, therefore, to proceed as correctly as possible.

It was long denied that it was intended by the act of 1887 to provide that the Interstate Commerce Commission should have the power to name a rate for the future, if after hearing and investigation an existing rate was found unreasonable. From the passage of the act to 1896 the Commission substantially exercised this power, either with or without the aid of the courts. In 1896 the Supreme Court^{*} held that the language of the act contained no such authority, largely on the ground that such extensive power is not to be implied, but can only result from express delegation. The patrons of the carriers and the Commission were much wrought up by this decision but the authority of the court was final. The shippers sought additional legislation, chiefly legislation by which some tribunal, preferably the Interstate Commerce Commission, would be empowered to substitute a reasonable for an unreasonable rate. This resulted first in the passage of the Elkins' law (act of February 19, 1903, 32 Stat. L., 847); a decade of agitation was required to secure the relief afforded by the second important amendment, the act of June 29, 1906 (34 Stat. L., 584). Upon the constitutionality of the last-mentioned act grave

^{*}I. C. C. v. C. N. O. & T. P. R. Co. (167 U. S., 479).

doubts have been expressed and only a decision of the court of last resort will settle the matter.

That the several acts have been beneficial to the carriers, their patrons, and the country at large can not be gainsaid, and although specific instances may be cited to the contrary, on the whole this legislation has been advantageous to the country.

The present work has been prepared primarily for the practitioner, but the author has kept in view the fact that a large number of cases before the Commission are conducted by laymen, who, while possessing an intimate knowledge of the facts involved, must necessarily lack the training to advantageously present them and to argue upon the application of the statute. It has also been kept in mind that the procedure is special, a distinct branch of transportation law, requiring in most instances technical knowledge of the facts and of the law; without at least the latter, the practitioner is at a disadvantage.

As the laws creating State railroad commissions have been frequently modeled on or served as models for the Federal enactments, and as there is often great similarity in the powers of the Federal and State commissions, and as in many instances the procedure before those tribunals is not materially different, it is believed that the rules and principles herein stated may serve as an aid and authority in proceedings before State commissions.

The second part of the work attempts to point out only those peculiar characteristics applicable to interstate commerce cases before the courts. Should information be needed upon Federal procedure, general in its nature, reference may be had to the numerous standard works upon that subject.

The author desires to express his appreciation of the assistance and suggestions given him by George F. Brownell, Esq., of New York, and C. R. Hillyer, Esq., special attorney of the Bureau of Corporations, Department of Commerce and Labor; and his thanks are due to the West Publishing Company of St. Paul, for permission to use the American Digest Classification Scheme, in conformity to which the work has been arranged as far as appropriate.

JOHN B. DAISH.

WASHINGTON, D. C., *February, 1909.*

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PART I

Procedure Before the Interstate Commerce Commission

CHAPTER I

INTRODUCTION

Sec. 1. Genesis of the Interstate Commerce Commission.—The Interstate Commerce Commission was created by “An act to regulate commerce,” approved February 4, 1887 (24 Stat. L., 379). By this act,¹ the Commission consisted of 5 Commissioners appointed by the President by and with the advice and consent of the Senate. Prior to the amendment of March 2, 1889 (25 Stat. L., 855) the Commission reported annually to the Secretary of the Interior and it was considered and deemed a part of that Executive Department. By the act just mentioned, which is still in force and effect, the Commission is required on or before the 1st day of December in each year to make a report direct to the Congress. This change segregated the Commission from the Interior Department, and since 1889 it has been an independent organization, not attached to or forming a part of any of the Executive Departments. It is, in theory, responsible only to the Congress, to which it is directed to report.

The amending statute, approved June 29, 1906, increased the number of Commissioners to 7, appointed for a term of seven years, one retiring each year, and each receiving an annual salary of \$10,000.

The present Commissioners² are Martin A. Knapp, of New York, chairman; Judson C. Clements, of Georgia; Charles A. Prouty, of Vermont; Francis M. Cockrell, of Missouri; Franklin K. Lane, of California; Edgar E. Clark, of Iowa, and James S. Harlan, of Illinois.

The name “Interstate Commerce Commission” may convey the im-

¹The act was modeled upon the following English acts: The railway and canal traffic act, 1854, (17 and 18 Vict., c. 31), and The regulation of railways act, 1868, (31 and 32 Vict., c. 119), and The regulation of railways act, 1873, (36 and 37 Vict., c. 48). Previous legislation under the commerce clause of the Constitution was act of Mar. 3, 1873 (now secs. 4386-4390 R. S. U. S.), relating to the transportation of live stock; act of June 15, 1866 (now sec. 5258 R. S. U. S.), permitting carriers by rail to form continuous lines; act of May 29, 1884, prohibiting interstate transportation by railroads of livestock afflicted with contagious diseases.

²The first Commission consisted of Thomas M. Cooley, of Michigan, chairman; William R. Morrison, of Illinois; Augustus Shoonmaker, of New York; Aldace F. Walker, of Vermont, and Walter L. Bragg, of Alabama. Others who have served on the Commission are Wheelock G. Veazey, of Vermont; James W. McDill, of Iowa; James D. Yeomans, of Iowa; William J. Calhoun, of Illinois, and Joseph W. Fifer, of Illinois.

pression that all or a large part of the power granted to the Congress by the Constitution^a is vested in that body. Such is not the case. As a matter of fact very general provisions for the regulation of interstate commerce are confided by law to the Department of Commerce and Labor^b and are exercised by it through the Bureau of Corporations, Bureau of Navigation, Light-House Board, Steamboat Inspection Service, and like agencies of the Government. The commerce regulated by the act to regulate commerce and subject to the control of the Interstate Commerce Commission, is confined to that large body of interstate commerce dependent upon railroads for its movement, or, under the act of June 29, 1906,^c upon certain carriers whose operation is closely allied to carriers by rail and upon pipe lines.

The causes leading up to the passage of the original act to regulate commerce were judicially stated by the Supreme Court in *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479), as follows:

Before the passage of the act [to regulate commerce] it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how these abuses should be corrected and what control should be taken of the business of such corporations.

The complaints against the then existing railway management were thus stated in the report of the Senate Select Committee on Interstate Commerce (Cullom Committee), submitted to the Senate January 18, 1886 (p. 180):

1. That local rates are unreasonably high, compared with through rates.
2. That both local and through rates are unreasonably high at noncompeting points, either from the absence of competition or in consequence of pooling agreements that restrict its operation.
3. That rates are established without apparent regard to the actual cost of the service performed, and are based largely on "what the traffic will bear."
4. That unjustifiable discriminations are constantly made between individuals in the rates charged for like service under similar circumstances.
5. That improper discriminations are made between articles of freight and branches of business of a like character, and between different quantities of the same class of freight.
6. That unreasonable discriminations are made between localities similarly situated.
7. That the effect of the prevailing policy of railroad management is, by an elaborate system of secret special rates, rebates, drawbacks and concessions, to foster monopoly, to enrich favored shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor.

^a Constitution (art. I, sec. 8, Cl. 3): "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

^b Established by act of Feb. 14, 1903 (32 Stat. L., 830).

^c "The act to amend an act entitled 'An act to regulate commerce,' approved Feb. 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission." Approved June 29, 1906 (34 Stat. L., 504).

8. That such favoritism and secrecy introduce an element of uncertainty into legitimate business that greatly retards the development of our industries and commerce.

9. That the secret cutting of rates and the sudden fluctuations that constantly take place are demoralizing to all business except that of a purely speculative character, and frequently occasion great injustice and heavy losses.

10. That, in the absence of national and uniform legislation, the railroads are able by various devices to avoid their responsibility as carriers, especially on shipments over more than one road, or from one State to another, and that shippers find great difficulty in recovering damages for the loss of property or for injury thereto.

11. That railroads refuse to be bound by their own contracts, and arbitrarily collect large sums in the shape of overcharges in addition to the rates agreed upon at the time of shipment.

12. That railroads often refuse to recognize or be responsible for the acts of dishonest agents acting under their authority.

13. That the common law fails to afford a remedy for such grievances, and that in cases of dispute the shipper is compelled to submit to the decision of the railroad manager or pool commissioner, or run the risk of incurring further losses by greater discriminations.

14. That the differences in the classifications in use in various parts of the country, and sometimes for shipments over the same roads in different directions, are a fruitful source of misunderstandings and are often made a means of extortion.

15. That a privileged class is created by the granting of passes, and that the cost of the passenger service is largely increased by the extent of this abuse.

16. That the capitalization and bonded indebtedness of the roads largely exceed the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued.

17. That railroad corporations have improperly engaged in lines of business entirely distinct from that of transportation, and that undue advantages have been afforded to business enterprises in which railroad officials were interested.

18. That the management of the railroad business is extravagant and wasteful, and that a needless tax is imposed upon the shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents engaged in a reckless strife for competitive business.

The idea of a commission in connection with the creation and affirmance of rights and as contradistinguished from a court, the commission to have power to investigate complaints of shippers and to secure information from which to recommend additional legislation, came from the then existing railway commissions in the various States and Territories. In 1886 there were 38 States and 8 Territories, 46 in all. In 10 States and 6 Territories there was then in force no regulation of carriers, or practically none. These States and Territories were Arkansas, Delaware, Florida, Indiana, Louisiana, Maryland, Pennsylvania, New Jersey, Tennessee and West Virginia (States), and Arizona, Idaho, New Mexico, Washington and Utah (Territories). In the remaining 30 States and Territories, all of

which had some regulation of carriers, the commission system had been adopted by 25, but Nevada, North Carolina, Oregon, Texas, and Montana depended on legislative restrictions and no special means for their enforcement had been provided.

The following States and Territories had railroad commissions in 1886, the date of their establishment being as indicated: New Hampshire, 1844; Connecticut, 1853; Vermont, 1855; Maine, 1858; Ohio, 1867; Massachusetts, 1869; Illinois, 1871; Rhode Island, 1872; Michigan, 1873; Wisconsin and Minnesota, 1874; Missouri, 1875; California and Virginia, 1876; Iowa and South Carolina, 1878; Georgia, 1879; Kentucky, 1880; Alabama, 1881; New York, 1882; Kansas, 1883; Mississippi, 1884; Nebraska, Colorado, and Dakota Territory, 1885.

The difficulty experienced by the user of transportation facilities in enforcing his common-law rights and of the necessity for some additional remedy, such as the commission system, was stated by the report of the Georgia Railway Commission in its report for 1881, as follows:

Prior to the act of 1879 [the act creating the Georgia commission] the common-law right of the citizen to be protected against extortion and unjust discrimination existed in its full force, but the remedy for its violation was wholly inadequate. Practically the citizen had no rights, though his theoretical right was ample and complete.

The rights of the railroad companies were well defined enough, and their remedies also were adequate, being in their own hands. It was their capacity for abusing their powers which was not sufficiently held in check. * * *

So unequally were the parties matched that in the whole history of the State there has been (so far as we remember) not one single case of a suit by a citizen to enforce this common-law right—and but one to enforce even a statutory right for an overcharge. In that case the charter of the railroad in express terms limited the rates, yet the railroad fixed its rates beyond the chartered limit, printed them and collected them, and was checked by this suit.

A remarkable commentary on the absolute worthlessness of rights without remedies.

The character of the State railroad commissions, their varying powers and their effect upon railway management was thus stated by the special committee of the Senate (Cullom committee) in its report in 1886 (p. 64):

The State railroad commissions, which are to-day a recognized factor in railway administration, have come into existence and prominence within the last ten or fifteen years, although there were so-called commissions at an earlier period. New York had a short-lived one in 1855, and after the civil war several were created for a temporary purpose, distinct from regulation, such as that in Arkansas, which passed upon applications for State aid to railroads, and that in Tennessee, in 1870, which was authorized to sell or lease railroads in default to the State for loans. There are marked differences in the plan upon which the existing State commissions are organized. Of the older ones, those of the New England States, with the exception of Massachusetts and New Hampshire,

form a distinct class by themselves, their duties being mainly limited to the inspection of the railway equipment and service.

Of an entirely different type were the commissions of the Western States, which owed their origin to the wide spread "granger" movement. Whatever may be said of the character of the legislation inspired by that agitation, it certainly served a timely and useful purpose in its day, and substantial and beneficial results must be accredited to that popular uprising against the railroad corporations. Matters had reached such a pass that nothing short of the sturdy, forceful methods adopted in Illinois and in neighboring States could have allayed the gathering storm of public indignation which the then existing methods of management had aroused. But when, in the notable "granger cases," the United States Supreme Court upheld those methods and left the railroads at the mercy of the State legislatures, the corporations assumed a radically different attitude toward the community and toward the law-making power. They have since been more ready to recognize their public obligations, greater respect for public opinion is manifested, and in consequence the recommendations of the State commissions, which were at first contemptuously ignored, have since, as a rule, been complied with. This radical change of policy, not adopted voluntarily, but prompted solely by motives of self-interest, has been taken advantage of by the State commissions with acknowledged favorable results, chief among which have been the cultivation of a better understanding and state of feeling between the railroads and the people, and a sufficient mitigation of the local abuses most prevalent to sensibly diminish the volume of complaint.

Sec. 2. Qualifications of the Commission.—In order to be eligible Commissioners shall not be in the employ of, or hold any official relation to, any common carrier subject to the provisions of the act to regulate commerce, or own stock or bonds therein, or in any manner be pecuniarily interested in such common carriers. It is further provided that the Commissioners shall not engage in any other business, vocation or employment. Not more than four of the Commissioners shall belong to one political party.

Commissioners may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

Sec. 3. Divisions in the Office of the Commission.—For the purpose of conducting the business of the Commission expeditiously several divisions have been provided for, including the operating division, division of prosecutions, safety appliance division, division of statistics and accounts, and division of tariffs and transportation.

Sec. 4. Operating division.—The operating division has charge of the correspondence of the Commission with shippers and carriers. For the purpose of promptly answering inquiries coming from various sections of the country, certain States have been assigned to the several Commissioners and correspondence relating to them is conducted by a particular Commissioner. The grouping of these States for the purpose of correspondence should not be confused with either the statistical grouping (*see sec. 10, post*), or the assigning of cases to the several Commissioners for decision.

When cases are at issue and ready for hearing they are assigned to the several Commissioners by lot. Correspondence preliminary to filing a case may therefore be with one Commissioner, while the case may be assigned for hearing and decision to another.

Correspondence with the Commission ought to be addressed to the Commission at its office, American National Bank Building, 1317 F street northwest, Washington, D. C., unless specific directions otherwise have been made.⁶ Correspondence by carriers or corporations having several officials ought to be conducted by them with as few of the officials as possible, in conformity with Administrative Rules and Opinions, No. 79 (issued Nov. 16, 1906).⁷

Sec. 5. Law division.—The law division has general supervision of the legal force and staff of the Commission for the usual business and also when the Commission is a party to proceedings in the Federal courts. The legal staff consists of a solicitor and a number of attorneys regularly employed by the Commission and at times special counsel employed for particular cases.

Sec. 5a. Claims division.—This division “is charged with the investigation of claims involving reparation by the carrier to the shipper on account of alleged overcharge due to the application of excessive and unreasonable rates, misrouting, etc., which may be settled on informal complaint and are adjustable under the rules promulgated by the Commission.”

Sec. 6. Division of prosecutions.—The division of prosecutions, sometimes called the “rebate division,” takes charge of investigations into alleged criminal violations of the act. Upon receipt of information indicating criminal infraction of the interstate commerce law, this division makes such investigations as may be thought needful to determine whether or not the matter is one proper to be brought to the attention of the Department of Justice. If this question be resolved in the affirmative, the division prepares the case for presentation through the Department of Justice to the United States attorney in the district having jurisdiction.

Sec. 7. Safety appliance division.—The division of safety appliances has charge of the alleged violations of the safety appliance acts,⁸ and for the purpose of detecting violations employs inspectors. An attor-

⁶ Rules of Practice, rule XXI. See Appendix.

⁷ Tariff Circular No. 15-A, effective Apr. 15, 1908, p. 82.

⁸ An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes, approved Mar. 2, 1893 (27 Stat. L., 531; 2 Supp. R. S., 102), as amended by an act approved Apr. 1, 1896 (29 Stat. L., 85; 2 Supp. R. S., 455), and an act to amend an act entitled “An act to promote the safety of employees and travelers, and so forth,” approved Mar. 2, 1893, and amended Apr. 1, 1896, approved Mar. 2, 1903 (32 Stat. L., 943), and

ney, employed by the Commission, is especially assigned to prosecute such violations of these acts.

Sec. 8. Division of statistics and accounts.—The division of statistics and accounts has charge of the annual reports of carriers filed in conformity with law and the rules of the Commission, and is in charge of the Statistician of the Commission. These statistics, when compiled, are published in "Statistics of Railways in the United States," one volume appearing annually.

Sec. 9. Division of tariffs and transportation.—The division of tariffs and transportation has charge of the tariffs and schedules required by law to be filed with the Commission. The division is in charge of the Auditor, who prepares, at the direction of the Commission for use in court, certified copies of the contents of tariffs, and also furnishes, within reasonable bounds, the tariff rates applying between designated points.

Sec. 10. Statistical groupings.—In the division of statistics and accounts, and for the purpose of yearly compiling the statistics of railways, the United States is divided into 10 territorial groups. These groups do not correspond with the divisions of the country by which the correspondence is assigned to the several members of the Commission. The territorial groups for statistical purposes cover in a measure the railway or association divisions of the country.

The groups or territorial divisions for statistical purposes are:^{*}

Group I. This group embraces the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.

Group II. This group embraces the States of New York, Pennsylvania, New Jersey, Delaware, and Maryland, exclusive of that portion of New York and Pennsylvania lying west of a line drawn from Buffalo to Pittsburg via Salamanca, and inclusive of that portion of West Virginia lying north of a line drawn from Parkersburg east to the boundary of Maryland.

Group III. This group embraces the States of Ohio, Indiana, the southern peninsula of Michigan, and that portion of the States of New York and Pennsylvania lying west of a line drawn from Buffalo to Pittsburg via Salamanca.

Group IV. This group embraces the States of Virginia, North Carolina, South Carolina, and that portion of the State of West Virginia lying south of a line drawn east from Parkersburg to the boundary of Maryland.

Group V. This group embraces the States of Kentucky, Tennessee, Mississippi, Alabama, Georgia, Florida, and that portion of Louisiana east of the Mississippi River.

Group VI. This group embraces the States of Illinois, Wisconsin, Iowa, Minnesota, the northern peninsula of the State of Michigan, and that portion of the States of North Dakota, South Dakota, and Missouri lying east of the Missouri River.

Group VII. This group embraces the States of Montana, Wyoming, Nebraska, that portion of North Dakota and South Dakota lying west of the Missouri

an act authorizing the Commission to employ safety-appliance inspectors, approved June 28, 1902 (32 Stat. L., 444).

^{*} Tenth annual report, p. 97.

River, and that portion of the State of Colorado lying north of a line drawn east and west through Denver.

Group VIII. This group embraces the States of Kansas, Arkansas, that portion of the State of Missouri lying south of the Missouri River, that portion of the State of Colorado lying south of a line drawn east and west through Denver, that portion of the State of Texas lying west of Oklahoma, and the Territories of Oklahoma, Indian Territory, and the portion of New Mexico lying northeast of Santa Fe.

Group IX. This group embraces the State of Louisiana, exclusive of the portion lying east of the Mississippi River, the State of Texas, exclusive of that portion lying west of Oklahoma, and the portion of New Mexico lying southeast of Santa Fe.

Group X. This group embraces the States of California, Nevada, Oregon, Idaho, Utah, Washington, the Territory of Arizona and that portion of the Territory of New Mexico lying southwest of Santa Fe.

Sec. 11. Decisions of the Commission.—The cases decided by the Commission now cover 13 volumes, the first 11 of which were privately published,¹⁰ but beginning with volume 12 the decisions were published by the Government, and may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D. C. The reported decisions of the Commission should not be confused with the Annual Reports¹¹ of the Commission. The latter are the reports of the Commission to the Congress, and while they include reference to the more important cases decided by the Commission in the preceding year, the decisions are not therein reported in full, as in the former. These reports of decisions are cited as "I. C. C.," "Int. Com. Rep.," or "Inters-Com. Rep."

The official reports of the decisions of the Commission are:

Interstate Commerce Commission Reports, 5 volumes, 1887-1893, published by Strouse & Co., New York.

Interstate Commerce Reports, 6 volumes, 1893-1906, published by The Lawyers' Co-operative Publishing Co., Rochester, N. Y.

Interstate Commerce Commission Reports, 2 volumes. (Volumes XII and XIII) published by the Government Printing Office, Washington, D. C., containing the decisions from 1906 to date and to continue.

While the early decisions of the Commission published by The Lawyers' Co-operative Publishing Company (volumes I-IV) containing, in addition to the decisions of the Commission, some of the

¹⁰ The Lawyers' Co-operative Publishing Co. (Rochester, N. Y.). The same company published in 1896 an additional volume, being volume V, Decisions on Interstate Commerce Rendered by the Federal and State Courts. Five volumes of the decisions of the Commission were published by Strouse & Co. These cover the decisions from 1887 to 1893, under the title "Interstate Commerce Commission Reports" and are official.

The volumes printed by the Government are entitled "Interstate Commerce Commission Reports."

¹¹ The first four annual reports are reprinted in the decisions of the Commission, published by Strouse & Co.

pleadings and evidence in cases and as well the first four Annual Reports of the Commission, are not official within the meaning of section 14 of the act, so that they are competent evidence in all courts of the United States and of the several States without any further proof or authentication, they are in general use and frequently cited.

The citations in this work are to the official editions: The Strouse edition, volumes I-V; Lawyers' Co-operative edition, volumes VI-XI; Government Printing Office edition, volumes XII-XIII, and Advance Sheets, volume XIV.

Sec. 12. Annual Reports of the Commission.—The Annual Reports of the Commission contain, in conformity with law, much "information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary." These reports are valuable in that they review¹² yearly the decisions of the courts wherein they affect the powers or the work of the Commission, or the commerce clause of the Constitution. They are also valuable in that in them is to be found an official discussion of the various transportation problems of our economic development. Speaking generally these reports are the most valuable of the publications of the Commission.

Sec. 13. Administrative rulings and opinions.—The Commission has deemed it necessary from time to time beginning with the last amendment to the act, in 1906, to make certain rulings and opinions involving the construction and interpretation of the law. The necessity for these rulings and opinions arises largely from the fact that any violation of the act is made a misdemeanor and punishable. Parties uncertain of the meaning and intent of the act have applied to the Commission for advice in numerous instances, and the Commission has made certain general rules concerning routing, joint rates, passes, etc. These rules are for the guidance of shippers and carriers, and in addition to indicating what the Commission consider a violation of the law, assist materially to an understanding of the intent of the law.¹³

In the Twenty-first Annual Report, the Commission referred to its practice of making Administrative Rulings, as follows (p. 5):

¹² These reports contain syllabi of the decisions of the Commission in cases decided by them; the report for 1904 contains syllabi of all previously decided cases; subsequent reports contain the syllabi for cases decided during the previous year only.

¹³ The Executive Departments will not ordinarily make a ruling interpreting a law, but leave to one interested to place his own construction upon it. A notable instance of the custom is to be found in the record of the first conviction under the pure drugs act; the manufacturer of a remedy asked whether or not the label on the package was, in the judgment of the department, a compliance with the law; no information was given him, but a prosecution was brought. (U. S. v. Harper, in the Police Court for the District of Columbia, 1908).

A considerable part of the time has been occupied in giving administrative construction to various provisions of the law for the guidance of both shippers and carriers. To secure the best results of legislation with the least possible delay there was obvious need of a correct and uniform interpretation of the statute. Therefore, without reference to questions arising in particular cases, and to avoid unnecessary controversy, it has seemed our duty to construe the law in advance wherever it appeared obscure or ambiguous, so that the obligations of the railroads and the rights of the public might be promptly understood. This has resulted in numerous rulings explaining our view of the meaning and application of different sections and paragraphs of the statute. These rulings have in practically every instance been accepted by the carriers, even in cases where their legal advisers were not entirely in accord with the opinion of the Commission. The rulings and regulations already promulgated will be revised and printed in a separate document.

The benefits of this course are beyond question. The Commission has endeavored to adopt a workable construction of the law in all cases, and has as a rule announced its conclusions in matters of importance only after conference and discussion with representative shippers and traffic officials.

The list of the subjects concerning which administrative rulings and opinions have been made will be found in section 67, *post*, and those which deal with the jurisdiction of and procedure before the Commission are reproduced in the Appendix.

Sec. 14. Publications of the Commission.—The more important publications of the Commission are:

Annual Reports, 22 vols., 1888-1908.

Statistics of Railways in the United States, 20 vols., 1888-1908.

Proceedings National Association of Railway Commissioners, 20 vols., 1889-1908.

Railways in the United States in 1902. (Parts II, IV, V.)¹⁴

Part II. A forty-year review of changes in freight tariffs. Prepared by the Auditor of the Commission.

Part IV. State regulation of railways. Prepared by the Statistician to the Commission.

Part V. State taxation of railways and other transportation agencies. Prepared by the Statistician to the Commission.

Interstate Commerce Law as changed by the act of June 29, 1906.¹⁵

Tariff Circular 15-A, containing regulations governing the construction and filing of freight tariffs and classifications and passenger fare schedules; also administrative rulings and opinions.

Bulletin No. 1. Conference rulings of the Commission.

Tariff Circular 16-A, containing regulations governing the construction and filing of classifications and tariffs of express companies; also administrative rulings and opinions.

Bulletin No. 2. Conference rulings of the Commission.

Sec. 15. Sessions of the Commission.—The general sessions of the

¹⁴ Parts I and III have never been published.

¹⁵ Senate Doc. 266, 59th Cong., 2d sess., contains in parallel columns the act to regulate commerce and similar acts, showing the former acts and the same as amended by the act of June 29, 1906; the compilation, which is a valuable one for reference, is by C. R. Hillyer, esq., of the Department of Commerce and Labor.

Commission for hearing contested cases, including oral arguments, are held at its office in Washington at such times as the Commission may designate. Two weeks, beginning with the first Monday of each month, are set aside for the purpose of general sessions.¹⁶

Special sessions are held outside of Washington at such time and place as the business of the Commission may warrant and as it may deem expedient.

Sec. 16. Seal of the Commission.—The Commission is authorized by section 17 of the act to regulate commerce to have an official seal, and it is provided that this seal shall be judicially noticed.

Sec. 17. Secretary of the Commission.—Under the act to regulate commerce, the Commission is authorized to have a Secretary, and that official acts as the chief executive officer of the body. Certifications are issued in his name and correspondence, other than that relating to prospective complaints, is conducted with him.¹⁷

Sec. 18. Special examiners.—Under the act of June 29, 1906, the Commission is authorized to “employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda” kept by the carriers subject to the act.

The same act provides—

And to carry out and give effect to the provisions of the * * * [interstate commerce acts] * * * the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.—(Sec. 20.)

The Commission employs a number of special agents and examiners for the purposes just mentioned.

The examiners¹⁸ appointed in conformity with law to administer oaths, examine witnesses, and receive evidence, are 8 in number, one of whom is known as chief examiner; 7 of them act as assistants, one to each Commissioner. The chief examiner has charge of receiving petitions and authorizing service thereon if they be in due form; he also assigns cases for hearing and attends to other matters in connection with formal complaints.

Sec. 19. Employees.—In addition to those above mentioned, the Commission has a considerable number of employees such as confidential clerks, law clerks, and rate clerks—about 400, in all.

¹⁶ Mondays are “conference days” of the Commission, for the consideration of decisions and orders. The members can not usually be consulted on that day.

¹⁷ The present incumbent, Edward A. Moseley, has been the Secretary of the Commission since its organization.

¹⁸ The two classes of examiners should not be confused; one is to inspect accounts, the other to act as deputy commissioners and at the hearing of cases to administer oaths, examine witnesses and receive evidence. One deals with the accounts of railways inspecting its books, the other acts as a master or examiner in chancery, at the hearing of contested cases.

All of the employees are appointed by the Commission under the civil service rules.

Sec. 20. Docket of the Commission.—The Commission keeps a docket of cases in which is entered the names of the parties complainant and defendant and the dates of filing the complaint, answer, hearings, arguments, briefs, and the report or opinion and order. Cases are entered serially.¹⁹ The docket, which remains at the office in Washington, is much like a court docket, except there are no entries for costs. This docket also contains the "General investigations," under section 12 of the act; these cases are entitled "In re," or "In the matter of."

When hearings are held outside of Washington, the entire record of the case is at hand; this contains, when complete, the complaint, answers, transcript of testimony, exhibits, briefs, stenographic notes of oral arguments, if any, correspondence in connection with the case, and report and opinion.

The docket of informal complaints is much the same, each complaint taking a serial number.

Sec. 21. The time required for a decision.—The time necessary in which to have a decision upon a formal complaint is, as in other similar matters, uncertain; the reasons for delay which can be interposed are not as numerous, however, as in actions before the courts. Since the passage of the rate law of 1906, the number of complaints has been very large, and the Commission has been occupied not only with formal and informal complaints, but in prescribing forms of schedules and accounts and making administrative rulings. One can hardly expect a decision, if the case be contested, in less than six months. This time may be necessarily lengthened by reason of numerous hearings, the delays incident to any proceeding, and the importance of the questions raised.

The time usually required for an opinion after a case is submitted is from four to six weeks.

¹⁹ Formal complaints having numbers lower than 879 were filed prior to the date when the rate law of 1906 went into effect, Aug. 28, 1906; complaints numbered higher than 879 have been filed subsequent to that date. Informal complaints are numbered serially, the first number under the rate law of 1906 being 3727.

CHAPTER II

JURISDICTION OF THE COMMISSION

Sec. 22. Jurisdiction of the Commission.—The term “jurisdiction” when used in connection with the Interstate Commerce Commission in this work is used advisedly; it is not used in the same sense as the term is applied to strictly judicial bodies. The Commission, exercising as it does, some purely judicial functions, certainly quasi-judicial functions, it is perhaps not inappropriate to refer to its authority as “jurisdiction” if one take and interpret broadly the definition in *U. S. v. Arredondo* (6 Pet., 709):

The power to hear and determine a cause is jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action.

It is doubtful whether or not all the proceedings before the Commission can be technically denominated “cases” and whether or not the subject-matter of all the proceedings and all the claims of the parties constitute a “cause” or a “controversy,” and whether or not in all cases the Commission adjudicates or exercises judicial power over the parties to them. Some of the proceedings, and particularly, parts of them, are clearly judicial in their nature—i. e., the determination of the reasonableness of an existing rate.¹ Other features of the same proceeding have been said to be legislative in their nature—i. e., prescribing the rate for the future.² Other proceedings lack the element of judicial power and are clearly administrative in their nature, such as the right to prescribe the form of accounts.

In this chapter will be considered those powers of the Commission

¹ In *C. M. & St. P. R. Co. v. Minnesota* (134 U. S., 418), the court said: “The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination.”

² In *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479) the court held that “the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function.” And in the same case, at p. 499, the court said: “It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is, a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is, a legislative act.” Prior to the passage of the act of June 29, 1906, it had been held that the Interstate Commerce Commission had no power to prescribe rates for the future (*C. N. O. & T. P. R. Co. v. I. C. C.*, 162 U. S., 184); that the Commission had no power to fix maximum rates (*I. C. C. v. N. E. R. Co.*, 74 Fed., 70); that the Commission was not clothed with the power to fix rates (*I. C. C. v. L. V. R. Co.*, 74 Fed., 784).

which may be exercised by courts and quasi-judicial tribunals; in the succeeding chapter will be considered those powers of the Commission which are not ordinarily exercised by that class of bodies.

Sec. 23. Legal status of the Commission.—The Interstate Commerce Commission occupies, as has been seen, a peculiar place in the Federal Government, being disconnected from the Executive Departments, not attached to the judiciary and reporting to, but not a part, of the legislature. The courts are not harmonious in stating its legal status. In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), after considering the language of the eleventh and sixteenth sections of the act, the court said:

We think that the language of the statute, in creating the Commission and in providing that it shall be lawful for the Commission to apply by petition to the Circuit Court, sitting in equity, sufficiently implies the intention of the Congress to create a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts.

In another case³ the Commission is referred to as “an administrative board.”

That the power to “execute and enforce” is partly judicial, partly executive and administrative, but not legislative has been stated by the Supreme Court.⁴

It [the Commission] is neither a Federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings.⁵

It has been said to exercise quasi-judicial powers.⁶

Its functions have been said to be those of referees or special commissioners.⁷

Since the passage of the rate law in 1906, the Commission has referred to itself as an administrative body,⁸ and has also said that “there is an analogy between the jurisdiction of the Commission and that of a court of equity.”⁹

Sec. 24. Nature of jurisdiction of Commission.—The jurisdiction of

³ *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184). See also *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479).

⁴ *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479).

⁵ *K. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 567).

⁶ *I. C. C. v. C. N. O. & T. P. R. Co.* (76 Fed., 183), *I. C. C. v. C. N. O. & T. P. R. Co.* (64 Fed., 981), *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479), *I. C. C. v. L. & N. R. Co.* (73 Fed., 409).

⁷ *K. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 567).

⁸ *M. and K. Shippers Assn. v. M. K. & T. R. Co.* (12 I. C. C., 483). Under the former act the Commission in *Toledo Produce Ex. v. L. S. & M. S. R. Co.* (5 I. C. C., 166), referred to itself as a special tribunal whose duties, though largely administrative are sometimes semi-judicial, but it is not a court empowered to render judgment and enter decrees. In a recent work it is said of the Commission: “It is no longer an inquisitorial and advisory body. It is an investigating and prosecuting body, clothed with authority to enforce these orders.”—*Snyder Annotated Interstate Commerce Act*, supplement, p. 87.

⁹ *R. Com. v. H. V. R. Co.* (12 I. C. C., 398).

the Commission is purely statutory and its authority to act must be found either expressly or by necessary implication in the language of the statute; the courts have not tolerated any implied powers even to accomplish what it was argued were necessary to reach the evils complained of and an essential part of the process of reasoning.¹⁰

While the act contains certain provisions by which obligations are imposed on common carriers, and the Commission is charged with executing and enforcing the act, yet over such matters the Commission has no jurisdiction to order, but only to recommend.¹¹

The jurisdiction of the Commission must be determined by the language of section 1 of the act;¹² the regulations provided by the statute are not coextensive with the power of the Congress under the Constitution.¹³

It is manifest that the Commission does not have jurisdiction over all commerce among the States, nor over commerce with the Indian tribes, as such, nor all commerce with foreign nations.

The Commission is limited to inquiring into violations of the act:

INSTANCE.—In *N. Y. P. Ex. v. B. & O. R. Co.* (7 I. C. C., 612), the Commission held that its jurisdiction is confined to inquiring, whether the situation respecting rates, through routes, and differentials which the carriers have created, is in violation of the act to regulate commerce.

Sec 25. Effect of lack of jurisdiction.—While in a particular instance the Commission may not have jurisdiction, it may, nevertheless, if the matter involve interstate commerce and indicate violations of the act, make an investigation; for, by section 13, it is provided—

if * * * there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Want of jurisdiction of the Commission in any particular is necessarily fatal.¹⁴

¹⁰ *C. N. O. & T. P. R. Co. v. I. C. C.* (167 U. S., 479) the court said: "The question debated is whether it [the act] vested in the Commission the power and duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."

¹¹ *Re Bills of Lading* (14 I. C. C., 346).

¹² In *Re Express Companies* (1 I. C. C., 349) the Commission said: "The jurisdiction of the Commission is strictly statutory, and can not be extended by implication over other subjects than those which the act defines. In any case of doubtful jurisdiction it is far better that the legislative body should resolve the doubt." See also *Cosmopolitan Shipping Co. v. Hamburg-American P. Co.* (13 I. C. C., 266).

¹³ *Mattingly v. P. Co.* (3 I. C. C., 592).

¹⁴ *Chandler C. O. Co. v. Ft. S. & W. R. Co.* (13 I. C. C., 473), *Manning v. C.*

Sec. 26. Jurisdiction as affected by the amount in controversy.—As the jurisdiction of the Commission is not ousted by the absence of damage to a complainant, so the amount in controversy does not affect the jurisdiction of the Commission. There may or may not be damages claimed; the amount of traffic involved may be very small, the rate may be a "paper" rate; yet the jurisdiction of the Commission attaches, if only the essentials of a case—i. e., an alleged violation of the law.¹⁵

Sec. 27. Necessity that jurisdiction appear.—As the jurisdiction of the Commission is statutory¹⁶ there is no presumption that the Commission has jurisdiction; but such must affirmatively appear from the allegations in the petition and from the record. The jurisdiction of the Commission is a limited one, dependent solely on the statute giving the powers. What has been said¹⁷ concerning the circuit and district courts of the United States is applicable to the Commission:

Their powers can only be exercised when the facts which are alleged to set them in motion are such as Congress has declared they may take cognizance of * * * The plaintiff must allege the jurisdictional facts; when they are shown the presumption is in favor of the regularity of the proceedings.

The want of jurisdiction in a particular case may be raised by answer, as in *New York Hay Exchange v. P. R. Co.* (14 I. C. C., 178), where the answer of one of the defendants reserved the point; or by demurrer, as in *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266); or the Commission will take cognizance of the fact of its own motion, as in *Chandler C. O. Co. v. Ft. S. & W. R. Co.* (13 I. C. C., 473).

Sec. 28. Jurisdiction by consent.—Strictly speaking, the Commission has no jurisdiction, even in the sense in which that term is used in this work, by the consent of the parties. Not infrequently, however, the Commission undertakes an investigation at the request of commercial organizations, renders an opinion, but can, of course, make no order therein. The case involving the Differential Rates to and from Atlantic ports (11 I. C. C., 13) began by a general order of

& A. R. Co. (13 I. C. C., 125), *Capehart v. L. & N. R. Co.* (4 I. C. C., 265). The Commission can make no lawful order in any case of which it has no jurisdiction under the act (*Hussey v. C. R. I. & P. R. Co.* (13 I. C. C., 366), citing *McNulty v. Batty* (10 How., 72), *Ex parte McCardle* (7 Wall., 514), *Norris v. Crocker* (13 How., 429), *Koenigsberger v. Richmond Silver Mine Co.* (158 U. S., 48), *U. S. v. Boisdore's Heirs* (8 How., 121), *Yeaton v. U. S.* (5 Cranch, 281), *South Carolina v. Gaillard* (101 U. S., 437), *Railroad Co. v. Grant* (98 U. S., 398), *Freeborn v. Smith* (2 Wall., 173), *Insurance Co. v. Ritchie* (5 Wall., 541), *Moore v. U. S.* (85 Fed., 465).

¹⁵ It is not too much to say that at times proceedings have been brought before the Commission and entertained in which no principle of law has been involved and petty reparation asked.

¹⁶ *Brown on Jurisdiction* (sec. 22): For the necessity that persons exercising statutory powers must make them appear and that they must be true in fact. (*Ibid.*, sec. 23.)

¹⁷ *Brown on Jurisdiction* (sec. 22).

the Commission which was predicated on petitions from the commercial organizations of Boston, New York, Philadelphia, and Baltimore.

Such proceedings are more in the nature of an arbitration than otherwise, but lack the binding effect of an award, for the recommendations of the Commission may or may not be followed.

Sec. 29. Territorial jurisdiction of the Commission.—As the acts to regulate commerce are not as broad as the constitutional authority to the Congress respecting commerce, so the territorial jurisdiction of the Commission is not coextensive with the geographical power of the Congress in that behalf. The Constitution gives to the Congress power to regulate commerce “with foreign Nations,” and “among the several States” and “with the Indian Tribes.” Thus, the Congress has power to regulate all commerce, except intrastate.¹⁸ It has, by the acts to regulate commerce given to the Commission jurisdiction over commerce among the several States and Territories, technically such, and with foreign nations only to a limited extent—all only when conducted in a specified manner. No jurisdiction is given over commerce with the dependencies, not technically territories of the United States.

The geographical limit of the jurisdiction of the Commission is the physical territory of the United States proper (not including territory over which the Congress may exercise exclusive jurisdiction and not by law made Territories) and over commerce originating and terminating in the United States passing through adjacent foreign countries (Canada and Mexico),¹⁹ and originating in the United States destined to an adjacent foreign country (sec. 1). Its jurisdiction over import and export commerce, other than with the adjacent countries of Canada and Mexico, only applies while the articles of commerce are within the boundaries of this country; if beyond the 3 mile limit, it is free from the control of the Commission.²⁰

Trans-Atlantic and Trans-Pacific commerce are not subject to the act; nor commerce with Cuba, even if there be a common control, management,²¹ or arrangement between rail carriers in this country

¹⁸ In *Robbins v. Taxing District* (120 U. S., 489) the Supreme Court said: “In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems.”

¹⁹ In *Cist v. M. C. R. Co.* (10 I. C. C., 217) it was held that while the act to regulate commerce may be applied to the reasonableness of a rate from a point in Canada to a point in the United States, yet no United States statute could apply to a discrimination between places in a foreign country.

²⁰ *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266).

²¹ In *re Publication and Filing of Tariffs* (10 I. C. C., 55) it was held that public policy requires that the inland transportation should be subject to the act and that the publishing and maintaining of tariffs upon such traffic would, in general, work no hardship upon the carrier. It was also held that the provisions of the law on this behalf were mandatory. (Compare rule 86, Appendix.)

and a steamship line to Cuba,²² it being not an adjacent foreign country.

Within the States the Commission has no jurisdiction as the act does not (and of course a Federal statute can not) confer authority respecting intrastate commerce;²³ thus, the Commission will not enforce constitutional provisions of a State.²⁴

Sec. 30. Exclusive jurisdiction of the Commission.—Since the decision of the Supreme Court in *Abilene Cotton Oil Co. v. T. & P. R. Co.* (204 U. S., 426) it would appear that the Interstate Commerce Commission is the sole judge, at least in the first instance, of the reasonableness of an existing rate. In that case the court said:

A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable.

It is possible that the Commission has exclusive jurisdiction of cases seeking reparation, where the amount in controversy is less than \$2,000. The jurisdiction of the Circuit Court, where other than the United States are plaintiffs, is limited by the act of August 13, 1888 (25 Stat. L., 433), to cases where the amount in controversy is the sum above mentioned. Section 9 of the interstate commerce act gives to any person or persons claiming to be damaged the election to make complaint to the Commission or bring suit in any District or Circuit Court of the United States of competent jurisdiction. It does not provide, as does the Sherman anti-trust law (act of July 2, 1890, 26 Stat. L., 209), that suitors may sue in a circuit court "without respect to the amount in controversy." The legislative intention concerning the jurisdiction of the Federal courts in cases brought by one claiming to be injured, either under section 9 of the act or under section 16 (after an order by the Commission awarding reparation), has not been judicially determined. Cases involving the statutory sum of \$2,000, under both sections 9 and 16 have been brought, but it is doubted if any case has been filed in the Federal courts where the amount in controversy was less than the statutory amount. Until a decision in this matter there must be a question concerning whether or not the jurisdiction of the Commission, where the reparation claim-

²² *Lykes Steamship Line v. Commercial Union* (13 I. C. C., 310).

²³ Within the purview of the Constitution all commerce is, by being specifically mentioned, (a) foreign, (b) with the Indian tribes, (c) among the States; by exclusion, (d) intrastate. The acts to regulate commerce and the judicial decisions have subdivided foreign commerce into (1) foreign commerce while within the geographic limits of the United States; (2) foreign commerce originating in the United States and terminating in an adjacent foreign country (Canada and Mexico), or originating in an adjacent foreign country and terminating in the United States; (3) foreign commerce, which would otherwise be intra or inter state, which in its transit passes through an adjacent foreign country.

²⁴ *R. Com. v. L. & N. R. Co.* (10 I. C. C., 173).

ed is less than \$2,000 is exclusive, or concurrent with the Federal courts. Certain it is, the tendency of the cases is to limit the jurisdiction of Federal courts to those cases where the statutory sum is involved.

Statutory amount necessary to give circuit courts jurisdiction:

INSTANCE.—In *Holt v. Indiana Mfg. Co.* (176 U. S., 69), affirming *U. S. v. Sayward* (160 U. S., 493), and *Fishback v. Western Union Tel. Co.* (161 U. S., 96), the court said: "That the Circuit Court could not, under the statute [Aug. 13, 1888] take original cognizance of cases arising under the Constitution or laws of the United States, unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded \$2,000 * * * and the conclusion reached is not affected by the fact that the operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit courts to this court (*The Paquete Habana*, 175 U. S., 677)."

But the Federal courts will entertain a proceeding to restrain by injunction a rate to be made effective in the future.²⁶

If the jurisdiction of the Commission to determine the reasonableness of a rate effective either presently or in future is exclusive, it is believed that the better practice would be to concurrently file a complaint with the Commission alleging that the existing rates (or the rates effective in the future, as the case may be) are unreasonable and to file a bill in the Federal courts asking for an injunction against the present or proposed rates (with allegations of the action brought before the Commission), until the decision of the Commission be rendered. The Commission has recently held informally that it had jurisdiction to entertain a petition alleging unreasonableness of rates effective in the future, if the petition be filed subsequent to the filing of the schedule but prior to the date the rate is effective.

The Commission has, as well, exclusive jurisdiction in the first instance of applications by carriers for relief under section 4 (sec. 34), and probably for relief under the provisions of section 15 (sec. 35)—i. e., correction of regulations and practices of the carriers; making of through routes and joint rates, and determining the just and reasonable charge to be paid by the carrier for a service performed by the owner of the property to be transported.

Sec. 31. Concurrent jurisdiction.—The Commission has concurrent jurisdiction with the Federal courts, at the suit of one aggrieved, to correct violations of and compel obedience to the provisions of the interstate commerce act;²⁸ but if the wrong be one which can, consistently with the context of the act, be redressed by the Commission, the courts have no jurisdiction.²⁷

²⁶ Several cases having for their object an injunction against rates effective in the future were filed in the United States circuit courts in the summer of 1908.

²⁸ In *re Lennon* (166 U. S., 548). For the general chancery jurisdiction for Federal courts as applied to interstate commerce see sec. 157, *post*.

²⁷ *T. & P. R. Co. v. Abilene C. O. Co.* (204 U. S., 426).

The power of the Federal courts has been invoked to compel obedience to the provisions of section 3 of the act;²⁸ to enjoin rates alleged to be unreasonable, when an action to determine the fact is pending before the Commission;²⁹ and to prevent unlawful discrimination.³⁰

The Commission has concurrent jurisdiction, under the provisions of section 9 of an action brought by one claiming to be damaged by any common carrier subject to the provisions of the act.³¹

The Commission has no jurisdiction concurrent with the State courts, for, by the act, such jurisdiction as is conferred is to the Federal courts only;³² in some instances, however, there may be an apparent concurrent jurisdiction—as, for example, a State court or commission may have jurisdiction to compel a switch connection—on the theory that intrastate traffic is transported over it,³³ and, if the traffic is also interstate, the Commission, under section 1, would have authority to compel its construction.³⁴

Sec. 32. Jurisdiction to determine entire controversy.—Not infrequently cases are determined by the Commission, but by reason of lack of evidence, or other defect, not jurisdictional, the Commission can not award reparation or make a final order. In such instances, the case is often held open for proof of reparation, as in *Farmers' Warehouse Co. v. L. & N. R. Co.* (12 I. C. C., 457), or to complete proof on some specific point, as in *Richmond Eltr. Co. v. P. M. R. Co.* (10 I. C. C., 629).

If the defect be jurisdictional, the case is dismissed without prejudice, as in *Johnston-Larimer D. G. Co. v. W. R. Co.* (12 I. C. C., 51).

General investigations may be predicated upon facts alleged in a formal petition, which has for some reason been dismissed:

INSTANCE.—In *White v. M. C. R. Co.* (3 I. C. C., 281), where argument was had upon defendant's motion to dismiss the complaint for insufficiency of allegations showing a violation of the act, but the complainant had filed some depositions taken before the hearing of the motion, the Commission examined the depositions with a view of ascertaining whether or not their relation to the allegations of the complaint was such as to show an unlawful practice by the defendant, and while the complaint was dismissed without prejudice the Commission held it its duty to proceed against the defendant upon its own motion.

²⁸ *Central Stock Yards Co. v. L. & N. R. Co.* (47 Fed., 771), *C. B. & Q. R. Co. v. B. C. R. & N. R. Co.* (34 Fed., 481).

²⁹ *Tift v. S. R. Co.* (123 Fed., 794).

³⁰ *Interstate Stock Yards Co. v. I. U. R. Co.* (99 Fed., 472).

³¹ Whether the jurisdiction is concurrent in all such cases, see sec. 30, *ante*.

³² *Fitzgerald v. Fitzgerald etc.*, *Constr. Co.* (41 Nebr., 467), *Carlisle v. M. P. R. Co.* (168 Mo., 652), *Edmunds v. I. C. R. Co.* (80 Fed., 78), *Van Patten v. C. M. & St. P. R. Co.* (74 Fed., 981), *Copp v. L. & N. R. Co.* (43 La. Ann., 511), *Swift v. P. & R. Co.* (58 Fed., 858).

³³ *W. M. & P. R. Co. v. Jacobson* (179 U. S., 287).

³⁴ It may be that this power falls exclusively within the police powers of the States (*Woodruff v. N. Y. S. N. E. R. Co.*, 59 Conn., 63).

In *re Carriage of Persons Free, etc.* (5 I. C. C., 69) it was held that where an investigation by the Commission of its own motion inquiring into the business management of a carrier subject to the act had been fully concluded as to some matter and not concluded as to others, an order might be made *pendente lite* as to the former and the case retained for further investigation, consideration and order as to the latter.

In *re Alleged Unlawful Transportation Charges* (6 I. C. C., 624) where a complaint forwarded by a State railroad commission had caused the Commission to institute an inquiry on its own motion and the defendant had reduced certain rates of freight to certain points, they being the principal points concerning which testimony was given, but it appearing that rates to certain other points and traffic should be revised, it was held that while the defendant showed a disposition to remove the cause of complaint, no order would be made but that all the matters would be held open for such further action or investigation as upon the application or petition of any interested party might appear necessary.

In *Smith v. N. P. R. Co.* (1 I. C. C., 208) it was held where one had filed a complaint before the Commission and had set up a grievance which he had failed to prove the Commission might nevertheless, if a violation of the law by the defendant appear, retain the case and take the necessary steps to bring such violations of the law to an end.

Cases may be retained for proof of reparation :

INSTANCE.—In *MacLoon v. C. & N. W. Co.* (5 I. C. C., 84) it was held that by reason of the action of the defendant the complainant was entitled to reparation, but as the proof as to the extent of the complainant's damages were insufficient the case be held open without an order, and that upon notice of adjustment by the parties of the question of reparation the petition would be dismissed.

In *Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co.* (7 I. C. C., 513) a decision was rendered upon one branch of the case but was continued upon the question of reparation, all questions respecting which were left open, until proof of damages had been made by the members of the complaining association.

In *R. Com. v. S. F. & W. R. Co.* (5 I. C. C., 13) where an advance in rate was partly condemned it was ordered that the defendants be notified and required to make reparation for injuries occasioned by the amount of the unreasonable increase to the several persons entitled, but as such persons were not parties to the proceeding, and the amounts wrongfully exacted could not be determined from the evidence in the case the proceeding was continued for such further action or inquiry respecting the reparation as might become necessary.

Cases may be retained for further evidence upon particular points, if the circumstances warrant :

INSTANCE.—In *Hilton L. Co. v. W. & W. R. Co.* (9 I. C. C., 17) the case was retained for further investigation in regard to certain apparent discriminations resulting from shipment via two different routes.

In *Spartanburg B. of T. v. R. & D. R. Co.* (2 I. C. C., 304) the pleadings were submitted without evidence and the Commission ordered the case adjourned to a future date for the purpose of taking evidence upon the question of the commercial effect of a schedule of rates which was in controversy.

In *Rice v. C. W. & B. R. Co.* (5 I. C. C., 193) the case against one of the defendants was retained for further evidence and argument on the question whether water competition at various points justified a departure from the requirements of the first paragraph of the fourth section of the act, and for further investigation of the defendant's charges to non-competitive points. As to other

defendants the case was held open for additional evidence and argument after amendment of pleadings to be allowed upon the application of any party with notice.

Orders may be suspended temporarily to permit carriers to adjust rates to conform to the opinion :

INSTANCE.—In *Rea v. M. & O. R. Co.* (7 I. C. C., 43) an order issued in regard to a group rate, but the case was held open to permit a readjustment of rates and leave granted to the complainant to apply for an order respecting the readjustment as might be necessary, and also with leave to either party to introduce evidence.

In *Board of Trade of H. v. N. C. & St. L. R. Co.* (8 I. C. C., 503), the Commission made a report with its conclusions, and the defendants were given until a future date to readjust their rates in accordance therewith; and if at the date specified the rates had not been readjusted, that an order would issue in the premises.

In *Danville v. S. R. Co.* (8 I. C. C., 409) the case was held open and order suspended to await the readjustment of rates by the defendant carrier and its connections.

Sec. 33. Authority to make investigations on initiative of Commission.—The authority of the Commission to make general investigations and orders affecting a considerable number of carriers or a wide expanse of territory, upon its own motion, and without the formality of a complaint is conferred by section 13. The Commission "may institute an inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

Under this provision the Commission has instituted numerous investigations, general in their nature; in some orders have been made, in others no order could be made.³⁵

The investigations have covered the practices³⁶ of carriers as well as proposed advances in rates,³⁷ filing of tariffs³⁸ and relation of rates in particular kinds of commerce.³⁹

The right of the Commission to make and the nature of general investigations will be found discussed in *Re Proposed Advances in Freight Rates* (9 I. C. C., 382), *I. C. C. v. D. G. H. & M. R. Co.* (57 Fed., 1005), *U. S. v. M. P. R. Co.* (65 Fed., 909), *Harriman v. I. C. C.* (No. 315, Supreme Court, decided December 14, 1908), holding that evidence in such cases can only be exacted respecting matters which may be made the subject of a complaint.

³⁵ No order was made in *re Through Routes and Through Rates* (12 I. C. C., 163), but an order was made in *re Allowances to Elevators* (12 I. C. C., 86). In *re Divisions of Joint Rates* (10 I. C. C., 385) it was said: "This being a general investigation in which no specific charges have been formulated against particular defendants no order can be made, nor would any order apparently add to the prohibition of the statute itself."

³⁶ *Re Through Routes and Rates* (12 I. C. C., 163) *re Divisions of Joint Rates* (10 I. C. C., 385), *re Alleged Unlawful Rates and Practices* (8 I. C. C., 121), *re Bill of Lading* (14 I. C. C., 346), *re Tariffs and Classifications* (3 I. C. C., 19).

³⁷ *Re Proposed Advances in Freight Rates* (9 I. C. C., 382).

³⁸ *Re Alleged Unlawful Rates and Practices* (10 I. C. C., 473).

³⁹ *Re Relative Rates, Export and Domestic Traffic* (8 I. C. C., 214).

General investigation with notice and opportunity to be heard is a compliance with the statute:

INSTANCE.—In *re Alleged Excessive Freight Rates, etc.* (4 I. C. C., 116), it was held that where there was an investigation concerning the reasonableness of transportation rates and notice of the time and place of taking testimony had been given and an opportunity afforded carriers for calling and cross-examining witnesses, that such a proceeding was a substantial compliance with the statute.

Want of jurisdiction over a carrier does not preclude an investigation into its relation with carriers subject to the act:

INSTANCE.—In *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266), it was held that while the Commission may not have jurisdiction over certain carriers, such as ocean carriers, yet it is not precluded from an examination into the relation between such carriers and those over which it has jurisdiction.

Foreign rail carriers are subject to a general investigation:

INSTANCE.—In *re Investigation of Acts and Doings of G. T. R. Co.* (3 I. C. C., 89) it was held that foreign [Canadian] carriers doing business in this country are subject to the act to regulate commerce and also subject to a general investigation without formal complaint.

State statute repealing authority of complainant will not prevent general investigation:

INSTANCE.—In *R. Com. v. S. F. & W. R. Co.* (5 I. C. C., 13), it was held that where a complaint had been filed by a railroad commission in the interest of carriers and shippers, and subsequent to the filing of the complaint, the statute had repealed the authority of the State railroad commission, that such repealing law could not operate as a withdrawal or dismissal of the complaint; and further that to abate or dismiss the proceeding would be to sacrifice substance to form in contravention of the spirit and letter of the act and of the rules of court in analogous cases.

Sec. 34. Jurisdiction to grant relief under long and short haul section.—The Commission may grant relief against the provisions of section 4, relating to a greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer. Early in the history of the Commission applications for such relief were comparatively frequent; recently, however, applications of this nature have been few.⁴⁰

The Commission will exercise discretion in granting relief from the operation of the fourth section:

INSTANCE.—In *re petition C. H. & D. R. Co.* (6 I. C. C., 323), held, that the Commission will exercise a reasonable and lawful discretion in determining the description and exceptional character of the "special cases" by which the Com-

⁴⁰ The definite meaning of sec. 4 is difficult, if not unascertainable, as the Commission and court decisions are not at all in harmony. Such fact may account for the lack of petitions for relief.

mission is authorized to grant relief, and also in the extent to which such relief shall be granted.

If an order of the Commission results in hardship, the carrier may apply for relief under the fourth section:

INSTANCE.—In *Fewell v. R. & D. R. Co.* (7 I. C. C., 354), held, that if by an order of the Commission injustice or undue hardship should result to the carrier, it may apply for relief under the fourth section, as authorized in the proviso.

Sec. 35. Jurisdiction of the Commission to make an order upon petition—

UNDER SECTION 15

(I) *Respecting rates and practices.*—Jurisdiction to make an order respecting rates and practices not awarding damages is conferred under section 15. The essentials preliminary to such an order are: (A) a complaint by one mentioned in section 13 of the act, or by a common carrier; (B) a full hearing; and (C) an opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of the act, for the transportation of persons or property, as defined in section 1 of the act; or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unduly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the act.

By the order the Commission may determine⁴¹ and prescribe⁴² (a) what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as a maximum to be charged; (b) and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed. The Commission may also make an order, if the conditions precedent have been complied with that the carrier shall cease and desist from such violation to the extent to which the Commission shall find the same to exist.

The order under this section notifies the carrier to cease and desist, on or before a day named, and for a period named, from charging, demanding, collecting, or receiving for certain transportation the present rates (naming them); and to publish and charge, after a day named and for a period stated, and to collect and receive named rates for the named transportation. The order usually permits carriers to make rates effective in less time than the statutory notice.⁴³

(II) *Establishing through routes and joint rates.*—When no reasonable or practicable through route exists, the Commission may es-

⁴¹“Determine” is a purely judicial word.

⁴²“Prescribe” is a legislative term.

⁴³For form of order see *Nobles Bros. Gro. Co. v. Ft. W. & D. C. R. Co.* (12 I. C. C., 242).

tablish, after hearing, a through route and joint rate as maxima, and prescribe the divisions thereof, and the terms and conditions under which a through route, ordered, shall be operated.⁴⁴

By supplemental order, the Commission is authorized to apportion joint rates, if the carriers fail to agree concerning the same.

All branch roads are not entitled to joint rates:

INSTANCE.—In *R. V. R. Co. v. D. L. & W. R. Co.* (14 I. C. C., 191) it was held that “it does not follow that all branch railroad lines having switch connection with a main line of railroad are entitled to joint rates.”

(III) *Respecting allowances to owners of property.*—The Commission may by order fix the reasonable charge as the maximum to be paid by the carrier for service rendered or instrumentality furnished by the owner of property to be transported under the act.⁴⁵

UNDER SECTION 16

Jurisdiction to award reparation is conferred by section 16. The requirements are that there shall have been a complaint as provided in section 13 and that the Commission shall have determined that the party complainant is entitled to an award of damages⁴⁶ under the provisions of the act. The order directs the carriers to pay to the complainant the sum awarded on or before a day⁴⁷ named therein.

UNDER SECTION 1

Orders may be made by the Commission, as in section 15, under the provisions of section 1, relating to switch connections. The conditions precedent to such an order are that the application must be made by a shipper or lateral railroad and there must have been a failure to install and operate the switch after application in writing therefor; and that the Commission has heard and investigated a complaint in accordance with section 13, determined the safety and practicability of the switch, and the justification and reasonable compensation therefor.

Conditions necessary to give jurisdiction over switch connections:

INSTANCE.—In *R. V. R. Co. v. D. L. & W. R. Co.* (14 I. C. C., 191) the Commission thus stated the conditions necessary to give it jurisdiction over branch railroads: (1) that such switch connection should be reasonably practicable;

⁴⁴ Through routes and rates were established in *Gentry v. A. T. & S. F. R. Co.* (13 I. C. C., 171), *C. R. & I. C. R. & L. Co. v. C. & N. W. R. Co.* (13 I. C. C., 250). Through routes and rates were granted by defendant before opinion in *Long v. I. R. Co.* (14 I. C. C., 116). Through routes and rates previously existing were reestablished in *S. G. & L. Co. v. A. T. & S. F. R. Co.* (14 I. C. C., 364). On through routes and rates generally see *Re Through Routes and Rates* (12 I. C. C., 163).

⁴⁵ *Re Allowances to Elevators* by U. P. R. Co. (14 I. C. C., 315).

⁴⁶ While the statute uses the word “damages,” by custom the word “reparation” is more common. Sec. 13 alone uses the word “reparation.”

⁴⁷ The day on or before which the carrier is ordered to pay is generally from thirty to forty-five days after publication of the order.

(2) that it can be put in with safety; (3) that it will furnish sufficient business to justify the construction and maintenance of such switch connection. In this case the Commission ordered that a switch connection should be made with the defendant's line, with an existing siding, the expense of the connection to be borne by the complainant.

Commission may permit location of switch to be determined by parties:

INSTANCE.—In *Weleetka L. & W. Co. v. Ft. S. & W. R. Co.* (12 I. C. C., 503) the Commission refrained from making an order respecting switch connections preferring to leave the location thereof largely to the discretion and wisdom of the defendant; and thirty days were allowed the contending parties to reach an agreement.

Sec. 36. Miscellaneous judicial powers of the Commission.—The Commission possesses several powers which are the same or akin to similar powers given to or inherently exercised by judicial bodies:

(A) *Jurisdiction to issue subpoenas and administer oaths.*—The power of the Commission to issue subpoenas and administer oaths is given by section 17, as follows:

Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

Section 12 provides that—

for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing.

Examiners appointed by the Commission under the authority conferred by section 20 are authorized to “administer oaths, examine witnesses, and receive testimony.”

(B) *Jurisdiction to grant a rehearing, under section 16a.*—After a decision, order, or requirement has been made by the Commission, any party thereto may apply for a rehearing of the entire or a specified part of the case, and the Commission in its discretion may grant the application.⁴⁸

An application for a rehearing does not operate as a stay or excuse compliance with an order issued, but the Commission may issue a special order suspending the original order pending the motion or pending rehearing.

Under the former statute the Commission exercised the power to grant rehearings:

INSTANCE.—In *Page v. D. L. & W. R. Co.* (6 I. C. C., 548) held that the Commission has continuing jurisdiction over the rates and practices of carriers subject to the provisions of the act and is not precluded from rehearing a particular

⁴⁸For practice and procedure in application for rehearing see sec. 152, *post*.

case and amending or modifying its original order by the refusal of the Federal court to enforce such order, especially when the reasons assigned for the court's refusal did not relate to the principal question in controversy and are consistent with the approval of the amended or modified order.

(c) *Jurisdiction to change or modify an order.*—Section 16a authorizes⁴⁹ the Commission to reverse, change, or modify an order if, in its judgment, it is unjust or unwarranted. And when an order has been reversed, changed or modified, it is subject to the same provisions as was the original order.

(d) *Power to appoint special agents or examiners.*—The power to appoint special agents or examiners was conferred by section 7 of the act of June 29, 1906, amending section 20 of the act to regulate commerce. These officials are of two classes: (a) special agents or examiners to inspect and examine all accounts, records, and memoranda, and (b) special agents or examiners who shall have power to administer oaths, examine witnesses and receive testimony. The power to appoint referees and examiners has always been an incident of courts of superior jurisdiction, and is inherent in a court of equity;⁵⁰ the Commission could not, however, without this enabling legislation, transfer the duties of the nature above specified to deputies or employees.

(e) *Jurisdiction to make rules of practice.*—By section 17 the Commission may make a general rule or order for regulating its proceedings,⁵¹ form of notices and service of pleadings and orders; and it may amend such general orders.

Section 16a gives the Commission jurisdiction to make general rules concerning applications for rehearings.⁵²

Sec. 37. Jurisdiction to award reparation.—Jurisdiction to award damages under the provisions of the act, is conferred by section 16, as follows:

That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

By section 13, those in whose favor such an order can be made are: "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization," or "railroad commissioner or railroad commission

⁴⁹ The Commission exercised under the original act the power to modify its order. See sec. 153, *post*.

⁵⁰ *Kimberly v. Arms* (129 U. S., 512).

⁵¹ The Rules of Practice have been made in pursuance of this power, see Appendix.

⁵² For the rules concerning rehearings see Rules of Practice (Appendix) and sec. 152, *post*.

of any State or Territory." A common carrier complainant would not be entitled to an order awarding damages, for the right of such an one to complain is given in section 15 of the act; and the Commission is only authorized to award damages upon complaint filed under section 13.

Associations, bodies politic, or municipal organizations are not awarded reparation for the reason that such complainants are unable to prove damages; the members thereof, however, if the petition be a proper one, may be awarded reparation as they, and not the complainant itself, are injured.

An order awarding damages, must by section 14 be predicated on an opinion (report) containing the findings of fact on which the award is made.

The order awarding reparation, if based on a practice or regulation, notifies the carrier to refrain from the present, or from re-establishing the former, practice, and to pay to the complainants a specified sum, on or before a day named;⁵³ if the practice has been discontinued or the charge assessed unlawfully, the carrier is commanded to pay to complainant a certain sum on or before a day named.⁵⁴

It needs be observed that an order of the Commission awarding damages does not have the validity of the judgment of a court and is not obligatory upon the carrier. But it is provided (sec. 16) that "it shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect;" doubtless "such orders" refers to orders awarding damages for those orders are specifically mentioned in the preceding parts of that section, while subsequent portions of the section refer to orders other than for the payment of money. There is, however, a distinct obligation to obey orders of the Commission other than for the payment of money, being orders made under the provisions of section 15, for, knowingly failing or neglecting to obey any order under that section subjects the carrier, its officers, representatives, or agents or receivers, trustees and lessees to a forfeiture to the United States in the sum of \$5,000.

Power to award reparation construed:

INSTANCE.—In *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (10 I. C. C., 83) the Commission construed several objections to its jurisdiction to award damages. In disposing of the case originally it was left open for proof of damage and questions as to reparation were reserved until proof be made. The Commission state:

"The act to regulate commerce provides that any person suffering damage by failure of a common carrier subject thereto to obey its provisions, may apply to the Commission, which is required to ascertain what damage the complainant

⁵³ *Blackwell M. & E. Co. v. M. K. & T. R. Co.* (12 I. C. C., 24).

⁵⁴ *England v. B. & O. R. Co.* (13 I. C. C., 614).

has sustained, if any, and to order the carrier to make reparation in the premises. The defendants insist at the outset, with great earnestness, that this portion of the act is unconstitutional in that it imposes upon an administrative body judicial functions. While the arguments by which this contention is supported have been urged with great ability it is our impression that the point is not well taken. The order for reparation is not obligatory upon the carrier. It amounts simply to a recommendation which can only be enforced by a suit at law in which full opportunity for a jury trial is accorded. Plainly, the Congress, having jurisdiction of this subject, might create a body with authority to inquire whether this act had been violated, and what damages had been sustained. It might probably make the report of that body *prima facie* evidence in a suit brought by the person sustaining these damages for their recovery, so long as there was preserved to the defendants a trial by jury in due form of law. We do not, however, deem it profitable to examine the authorities cited in detail. The act creating this Commission clearly confers that authority and it is our duty to proceed as the statute requires, unless the unconstitutionality appears beyond reasonable doubt, certainly when, as here, the parties affected can not be injured by the exercise of such jurisdiction. No order of the Commission awarding damages can be enforced against these carriers, not a dollar of their property can be taken, except by the judgment of a court in which this question can be raised and passed upon. We hold, therefore, that the act is constitutional and valid in this respect."

In *La Salle & B. C. R. Co. v. C. & N. W. R. Co.* (13 I. C. C., 610) held that the power of the Commission to award reparation does not extend to divisions of rates between connecting carriers.

In *Eddelman et al. v. M. V. R. Co.* (13 I. C. C., 103) held that the Commission had no power to award damages for the failure to perform a contract to locate and maintain a switch.

In *Flaccus G. Co. v. C. C. C. & St. L. R. Co.* (14 I. C. C., 333) held that reparation may be awarded for misrouting. On the general subject of misrouting see Rule No. 70, Tariff Circular 15-A.

In *Perry v. F. C. & P. R. Co.* (5 I. C. C., 97) the Commission held that the provisions of the act required it to determine what reparation, if any, should be made by the carriers to parties injured by their violations of law.

In *MacLoon v. C. & N. W. R. Co.* (5 I. C. C., 84) the Commission after considering the several sections of the act held that it was its duty to pass upon the question of reparation for past damages whenever a claim was made therefore.

Reparation is an inadequate remedy:

INSTANCE.—In *McGrew v. M. P. R. Co.* (8 I. C. C., 630) the Commission said that the remedy by way of damages for unlawful rates is thoroughly inadequate and inconsistent, but that it is apparently the remedy prescribed by the act and the only remedy which is afforded to a shipper.

Jurisdiction over carriers is essential to reparation:

INSTANCE.—In *Capehart v. L. & N. R. Co.* (4 I. C. C., 265) it was held that no recovery by way of reparation could be had in a proceeding where the Commission had no jurisdiction of the carriers or of the traffic.

Grounds for reparation must exist:

INSTANCE.—In *R. Com. v. S. F. & W. R. Co.* (5 I. C. C., 13) where it appears that the carriers had not wilfully omitted or failed to notify the Commission

and the public of the advance in rates complained of, nor that any one had sustained damage or injury by reason of the failure or omission, there was not ground for recommendation of reparation.

The measure of damages for unreasonable rates:

INSTANCE.—In *Flint & W. Mfg. Co. v. L. S. & M. S. R. Co.* (14 I. C. C., 336) the Commission declined to accept the contention of one of the defendants that the act requires a carrier to collect and retain the published rate and that the shipper could not recover any part thereof in any proceeding, and affirming previous cases awarded reparation, measuring the same by the difference between the published rate and the rate found to be reasonable as applied to the shipment. See also *Perry v. F. C. & P. R. Co.* (5 I. C. C., 97).

Damages will not be awarded where trial by jury is required:

INSTANCE.—In *Councill v. W. & A. R. Co.* (1 I. C. C., 339) the Commission held that it would not go into the question of money damages when the claim is in the nature of an action of trespass for the reason that the defendant is constitutionally entitled in such a case to a trial by jury.

Reparation against a receiver, after order, must be presented to the courts:

INSTANCE.—In *Loud v. S. C. R. Co.* (5 I. C. C., 529) held that the question whether property in the hands of a receiver of a carrier after the matters complained of before the Commission are alleged to have occurred is subject to an order of reparation issued by the Commission, is one to be presented to and disposed of by the courts on proceedings therein for the enforcement of the order.

Sec. 38. Carriers over which the Commission has or has not jurisdiction.⁵⁵—By section 1 the act applies to and the Commission therefore has jurisdiction over certain common carriers engaged in a defined manner and in transporting a specified character of commerce. The term “common carrier” doubtless means what is ordinarily understood by that term; under the act it comprehends also by definition and inclusion “any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by water” and “express companies and sleeping car companies.”⁵⁶

⁵⁵ In determining the jurisdiction of the Commission it is often difficult to say whether a carrier is subject to the jurisdiction of the Commission because it handles the commerce specified in the act, or because the carrier is made subject to the act, for either of which reasons the Commission may have jurisdiction. For jurisdiction of the Commission as affected by the character of commerce see sec. 39, *post*.

⁵⁶ “A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or by water, and deliver the same, for all such as may choose to employ him; and every one who undertakes to carry and deliver, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier.”—Moore on Carriers, p. 18. The weight of authority is that express companies, particularly those operating over railroads, are common carriers of those goods which they undertake to carry, but the Commission held under the original act that it did not apply to this class of business unless as an incident of railroad operation (re *Express Companies*, 1 I. C. C., 349; see also

The defined manner in which the common carrier is engaged is, as to pipe lines as above set forth; as to others, they must be "engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)." (Sec. 1).⁶⁷

The term "railroad" means what is ordinarily meant by that word, but the act provides (sec. 1) that it "shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property." (Sec. 1).⁶⁸

The specified character of commerce is "passengers or property" when transported—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. (Sec. 1.)

The same section makes the provisions of the act apply to—
the transportation in like manner [i. e., wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment] from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United

U. S. v. Morsman, 42 Fed., 448). Sleeping-car companies, on the contrary, have not been held to be common carriers and liable as such (Moore on Carriers, p. 55); but under the present interstate commerce law they have been made defendants to proceedings not as yet determined.

⁶⁷In *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184) the Supreme Court said: "When goods are shipped under a through bill of lading, from a point in one State to a point in another and when such goods are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a through bill of lading we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifest." For other interpretations of the language of the statute see *Boston F. & P. Ex. v. N. Y. & N. E.* (4 I. C. C., 664), *Perry v. F. C. & P. R. Co.* (5 I. C. C., 97), *R. Com. v. Clyde S. S. Co.* (5 I. C. C., 324), *U. S. v. Wood* (145 Fed., 504), *U. S. v. Camden Iron Works* (150 Fed., 216), *Re Through Routes and Rates* (12 I. C. C., 163).

⁶⁸For a discussion of what is meant by the term "railroad" see Elliott on Railroads, 2d ed., sec. 4 and citations; the term is one without a settled and well-defined meaning and what it means must depend on the connection in which it is used. The indefiniteness of the term caused the Congress to broaden its meaning.

States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "transportation" in addition to its usual meaning shall by the terms of the act (sec. 1) include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.⁵⁹

Carriers handling import and export commerce:

INSTANCE.—In *N. Y. B. of T. & T. v. P. R. Co.* (4 I. C. C., 447) held that the act to regulate commerce specifically provides for the regulation of the transportation of foreign merchandise when brought from a foreign port of shipment to a port of entry of the United States upon a through bill of lading, or when transported from a foreign port to a port of entry of a foreign country adjacent to the United States and transported from such port of entry to a place of destination within the United States upon a through bill of lading. (See Rule 86, Appendix.) Compare *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), *Armour Packing Co. v. U. S.* (No. 470, Supreme Court, Oct. term 1907), *Re Relative Rates Upon Export and Domestic Traffic in Grain* (8 I. C. C., 214), *Kemble v. B. & A. R. Co.* (8 I. C. C., 110).

In *Re Investigation of Acts and Doings of G. T. R. Co. of Canada* (3 I. C. C., 89) it was held that the provisions of the act to regulate commerce apply to foreign as well as to domestic carriers engaged in the transportation of passengers or property for a continuous carriage or shipment from a place in the United States to a place in an adjacent foreign country and such carriers are subject to all of the regulations applicable to domestic carriers, respecting reports and filing of schedules and are subject to the jurisdiction of the Commission.

Jurisdiction over carriers handling commerce between points in same State if it passes through another State:

INSTANCE.—In *Milk Producers' & P. Assn. v. D. L. & W. R. Co.* (7 I. C. C., 92) held that a carrier engaged in transportation of commodities from points in the State of New York through the State of New Jersey to the city of New York is subject to regulation of the act, but traffic originating in the State of New Jersey and destined to the city of New York, but which is delivered to the consignees at Jersey City and the rates on which are made to Jersey City is intrastate traffic, and over it and the carriers transporting it the Commission has no jurisdiction. (*N. J. F. Ex. v. C. R. Co.*, 2 I. C. C., 142.)

In *U. S. v. D. L. & W. R. Co.* (152 Fed., 269) held that traffic from New York City to Buffalo, N. Y., which passed through New Jersey is interstate commerce and is subject to the provisions of the Elkins law.

In *New Orleans C. Ex. v. C. N. O. & T. P. R. Co.* (2 I. C. C., 375) the Commission held that commerce between points in the same State, but which being carried from one place to the other passes through another State is interstate commerce and subject to regulation by the provisions of the act.

⁵⁹Transportation is "carriage of persons or commodities from one place to another" (Standard Dictionary). The term may include taking of petroleum from one place to another by pipes laid underground (*Columbia Conduit Co. v. Com.*, 90 Pa., 307).

Intrastate carriers may become subject to the act:

INSTANCE.—In *Mattingly v. P. Co.* (3 I. C. C., 592) held that when a State carrier engages in interstate commerce it becomes a national instrumentality for the purposes of such commerce, and is subject to regulation by Congress and to the jurisdiction of the Commission.

In *Baer Bros. M. Co. v. M. P. R. Co.* (13 I. C. C., 329) it was held that a railway company whose road lies entirely within the limits of a single State becomes subject to the act by participating in through movement of traffic from a point in another State to a point in the State within which it is located although its own service is performed entirely within the latter State. (Affirmed in *Leonard v. K. C. S. R.*, 573.)

In *Re A. W. & B. R. Co.* (1 I. C. C., 315) it was held that a railroad company whose line is entirely within one State issues through bills of lading over its connecting lines to points in other States and makes through rates falls under the provision of the interstate commerce act.

Water carriers may become subject to the act:

INSTANCE.—In *R. Com. v. S. F. & W. R. Co.* (5 I. C. C., 13) held that the Clyde Steamship Company and other similar companies are common carriers engaged in interstate commerce by reason of an arrangement with rail carriers, and therefore subject to the jurisdiction of the Commission.

Receivership does not preclude jurisdiction of the Commission:

INSTANCE.—In *R. Com. v. Clyde S. S. Co.* (5 I. C. C., 324) held that the fact of a receivership for a defendant carrier after complaint filed should not interfere with the progress of the proceeding brought merely for the purpose of railway regulations. Affirmed, *Board of Trade v. A. M. R. Co.* (6 I. C. C., 1), and it was stated in *Independent Refiners' Assn. v. W. N. Y. & P. R. Co.* (6 I. C. C., 378) that receivers of railroad companies are common carriers, subject to the provisions and requirements of and to regulation under the act to regulate commerce. Leave to sue a receiver before the Commission is not necessary to give the Commission jurisdiction. (*May v. McNeill*, receiver, 6 I. C. C., 520.)

Federal charter does not preclude jurisdiction of the Commission:

INSTANCE.—In *Raworth v. N. P. R. Co.* (5 I. C. C., 234) held that because a railroad company is chartered by Federal authority it may nevertheless be, and in this case was, subject to the provisions of the act and to the jurisdiction of the Commission. Affirmed (*Merchants' Union v. N. P. R. Co.*, 5 I. C. C., 478).

Electric railway lines may be subject to the act:

INSTANCE.—In *Willson v. R. R. Co.* (7 I. C. C., 83) held that a carrier operating an electric line lying partly in the District of Columbia and partly in Maryland is subject to the jurisdiction of the Commission although it was constructed upon or along public highways and a street surface road for the convenience of passengers.

The Commission has no jurisdiction over those engaged in the transportation of passengers and property wholly within a State; "the provisions of this act shall not apply to the transportation of passengers and property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid," proviso of section 1.

The act is not applicable to carriers operating wholly by water,⁶⁰ and over them operating independently the Commission has no jurisdiction as to rates and practices but may inquire into their relation to carriers subject to the act.⁶¹

Intrastate carriers not subject to the act:

INSTANCE.—In *Mo. & Ills. R. R. T. & L. Co. v. C. G. & S. W. R. Co.* (1 I. C. C., 30) it was held that delivery of merchandise to a carrier for transportation from one point to another in the same State which the owner intends to have further transported into another State does not make the first transportation interstate commerce or render the carriers subject to the control of the Commission in respect to it even though the first carrier may be informed of the ultimate destination of the merchandise.

In *Heck v. E. T. V. & G. R. Co.* (1 I. C. C., 495) held that a short railroad chartered by a State but never owning any rolling stock or operating its road, but used as a means of conducting interstate traffic and operated by companies owning connecting interstate roads was one of the facilities and instrumentalities and that the carriers using it are subject to the provisions of the act.

In *C. M. & St. P. R. Co. v. Becker* (32 Fed., 849) held that "switching" is local and has no reference to interstate shipment, but may be regulated by State commission, by virtue of the police power.

In *Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co.* (7 I. C. C., 513) held that a stockyards company having under its charter the option to become a common carrier or not and permitting certain carriers to use its tracks imposing for the use thereof, a trackage charge is not a common carrier engaged in the transportation within the meaning of section one of the act, and not subject to the jurisdiction of the Commission.

Sec. 39. Jurisdiction of Commission as affected by character of commerce.⁶²—As the act applies to certain designated transportation agencies, engaged in a defined manner, in the transportation of a specified character of commerce, and as the jurisdiction of the Commission over carriers is in part dependent upon the fact whether they be engaged in the defined manner, in transporting the specified character of commerce, it becomes necessary to ascertain the commerce to which the act applies. If a carrier be subject to the act and hence to the jurisdiction of the Commission respecting a portion of its traffic, it does not follow that the jurisdiction of the Commission extends to all the traffic which the same carrier transports; thus, the Commission may have jurisdiction over the "A" railroad respecting the interstate traffic handled by it, but it has no jurisdiction over such carrier respecting the intrastate traffic handled by it; so, also, where the lines of a railroad are wholly within one State,⁶³ and it is not handling in-

⁶⁰ *Ex Parte Koehler* (30 Fed., 869).

⁶¹ *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266).

⁶² Carriers may be subject to the jurisdiction of the Commission because of either of two reasons (1) that the provisions of the act apply to the carriers as such, or (2) that they handle the commerce specified in the act. For the carriers over which the Commission has jurisdiction see sec. 38, *ante*.

⁶³ In *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184) the court said: "It

terstate traffic, or is not a common carrier," and it is not subject to the jurisdiction of the Commission.

Intrastate carrier engaged in handling interstate commerce is subject to the act:

INSTANCE.—In *Pennsylvania State Millers' Assn. v. P. & R. R. Co.* (8 I. C. C., 531) the Commission said: "It is well settled that a railway company whose road is wholly within the bounds of a single State, 'when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subject, so far as such traffic is concerned, to the regulations and provisions of the act to regulate commerce,' " citing *I. C. C. v. D. G. H. & M. R. Co.* (167 U. S. 642), *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184), and *The Daniel Ball* (10 Wall., 565).

In the course of decisions by the Commission and the courts the commerce over which the Commission has jurisdiction and as well commerce over which the Commission has not jurisdiction has, of necessity, been in part marked out. The statute, it will be observed, enacts that the provisions of the act shall apply to certain common carriers and to certain others (made common carriers by the act) engaged in certain transportation; the Commission is given authority to receive complaints against carriers subject to the act, to order them to cease and desist from violations thereof, and to "execute and enforce" the act. The jurisdiction of the Commission is not therefore as clearly defined as one might wish.⁶⁵ The Commission is not given jurisdiction in terms or control over any commerce; such powers as it has over commerce is through the medium of the handlers of commodities, moving by means of specified agencies and between specified points; commerce is thus reached indirectly and not directly. In determining the exact jurisdiction of the Commission there has frequently arisen the question of the particular kind of commerce which is within the purview of the act. If the transporta-

may be true that the 'Georgia Railroad Company' as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of the Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act in respect to such interstate commerce."

⁶⁴ *Cattle Raisers' Assn. of Texas v. Ft. W. & D. C. R. Co.* (7 I. C. C., 513).

⁶⁵ In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197) the Supreme Court said: "The powers of the Commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined."

tion agency falls within the purview of the act then the Commission has jurisdiction of the commerce handled by it; if the carrier does not come within the act then neither does the commerce transported by it.

It, therefore, becomes necessary frequently to know what particular kinds of commerce have been held to be within and without the statute.

Commission has jurisdiction over export and import commerce:

INSTANCE.—In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197) the Supreme Court after considering the act to regulate commerce state: "It would be difficult to use language more unmistakably signifying that the Congress had in view the whole field of commerce (excepting commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries. * * * Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the [first] section proceeds to declare that 'all charges made * * * shall be reasonable and just.'"

In *Armour P. Co. v. United States* (209 U. S., 56; s. c. 82 C. C. A., 135; 153 Fed., 1), the court, referring to the kind of commerce to which the act applies said: "It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins' law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the first section of the act (24 Stat. L., 379 ch. 104, U. S. Comp. Stat., 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) interstate commerce; (b) commerce between the United States and an adjacent foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point of transshipment; (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And it is contended that section 6, as amended (25 Stat. L., 855, chap. 382, U. S. Comp. Stat., 1901, p. 3158), does not require the filing of through export tariffs.

"The purpose of the Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of section 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. (*T. & P. R. Co. v. I. C. C.*, 162 U. S., 197). There is no attempt in the language of the act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

"What reasonable ground is there for supposing that the Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through route is obtained

by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier.

"The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of the Congress to bring interstate commerce within the control of the provisions of the law up to the time of ocean shipment. This construction is reinforced by the broad provisions of section 6 of the act as to publishing schedules, showing rates, fares, and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission." (Re Tariffs on Export and Import Traffic, 10 I. C. C., 55).

In *Kemble v. B. & A. R. Co.* (8 I. C. C., 110) the Commission held that export and import traffic was not removed from the jurisdiction of the Commission by the decision in *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), but that on the contrary the effect of that decision was to extend the Commission's jurisdiction; and that the Commission has full authority to pass upon grievances of any individual or locality which is alleged to arise from rates upon export or import goods as compared with the rates on domestic merchandise.

In *Pittsburg P. G. Co. v. P. C. C. & St. L. R. Co.* (13 I. C. C., 87) held that transportation from a seaport of the United States or an adjacent foreign country to an interior American destination, in contemplation of a through movement of freight from a point in a foreign but nonadjacent country, whether upon a joint through rate or upon a separately established or proportional inland rate applicable only to imports moving through, is not a "like service" to the transportation of traffic starting at such domestic port, though bound for the same destination.

In *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266) held that the Commission has no jurisdiction as to shipments moving from ports of the United States to a foreign country not adjacent when such shipments are not carried by rail, or by rail and water, from an inland point of origin to a port of transshipment, and that an inland movement of export or import traffic is a condition precedent to the attaching of jurisdiction. Affirmed in *Lykes Steamship Co. v. Commercial Union* (13 I. C. C., 310).

In *N. Y. Board of T. & T. v. P. R. Co.* (4 I. C. C., 447) held that the act to regulate commerce provides for the regulation of the transportation of foreign merchandise when brought from a foreign port of shipment to a port of entry of the United States, and transported from such port of entry to a place within the United States upon a through bill of lading, or when transported from a foreign port to a port of entry of a foreign country adjacent to the United States, and transported from such port of entry to a place of destination within the United States upon a through bill of lading.

It would appear from Rule 86 of Tariff Circular, No. 15-A (see Appendix), that the jurisdiction of the Commission only extends to export or import traffic while within the territorial limits of the United States. A discrimination between places in Canada can not be corrected by the Commission. (*Cist v. M. C. R. Co.*, 10 I. C. C., 217.)

Intrastate transportation of interstate commerce:

INSTANCE.—In *James & Mayer Buggy Co. v. C. N. O. & T. P. R. Co.* (4 I. C. C., 744) it was held that goods shipped from Cincinnati, Ohio, to points in Georgia

are interstate traffic, and the roads forming a part of the line over which such goods are carried to destination are engaged in interstate commerce, and subject to the act; and where two or more roads forming a continuous connecting line between points in different States bill and carry interstate traffic through to certain stations on the delivering road, neither one road nor both can evade the obligations of the fourth section of the act by declaring that as to such traffic the terminal road is a local carrier. (See *C. N. O. & T. P. R. Co. v. I. C. C.*, 162 U. S., 184).

Commerce between a State and the District of Columbia:

INSTANCE.—In *Willson v. R. C. R. Co.* (7 I. C. C., 83) the Commission state that all internal commerce is either State or interstate; commerce carried on between the State of Maryland and the District of Columbia is not subject to regulation by Maryland laws, and is therefore within the jurisdiction of Congress. (The present act clearly covers transportation to and from and within the District of Columbia; and by recent act the Commission has been given certain duties respecting street railways in the District of Columbia, see Sec. 55, *post.*)

Jurisdiction over interstate rates is not ousted by discrimination due to State rate:

INSTANCE.—In *Reliance Textile and Dye Works v. S. R. Co.* (13 I. C. C., 48) held that where a discrimination results from a combination of a State and an interstate rate, both made by the carrier, the jurisdiction of the Commission is not ousted by the fact that the discrimination is produced by the improper State rate.

Commerce between points in same State if it passes through another State:

INSTANCE.—See “Jurisdiction over carriers handling commerce between point in same State if it passes through another State.” (Sec. 38, *ante.*)

Commerce wholly within a State is not subject to the provisions of the act, being excepted by the proviso of section 1:

That the provisions of this act shall not apply to transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

Of course any attempt to include such commerce would be contrary to the commerce clause of the Constitution, and beyond the power of the Congress.

Prior to the passage of the act of June 29, 1906, intraterritorial commerce was not subject to the act; the provisions of the present act apply to common carriers engaged in the transportation of passengers or property, in the manner defined in the first section, “from one place in a Territory to another place in the same Territory.” Interterritorial shipments were subject to the act as it existed prior to the last amendment.

Commodities intended for transportation to another State are not subject to the jurisdiction of the Commission:

INSTANCE.—In *N. J. F. Ex. v. C. R. Co.* (2 I. C. C., 142) it was held that

where traffic originates in the State of New Jersey and is destined to the State of New York, but the delivery by the carriers to the consignees is made at Jersey City, N. J., and the rates are made, not to New York but to Jersey City, the traffic is not interstate and the Commission has no jurisdiction over the rates.

In some instances it becomes⁶⁶ necessary to ascertain at what relative time, under the act, the jurisdiction of the Commission attaches, and when it terminates. It is submitted that as to that commerce over which the Commission may exercise jurisdiction under the act, the jurisdiction attaches at the time the commodities are delivered to the carrier and the owner ceases to exercise dominion over them; and that the jurisdiction remains at least until the commodities have come into the possession, actual or constructive, of the consignee.

Whenever property has begun to move as an article of commerce, from a point in one State to a point in another it then becomes interstate commerce,⁶⁷ and if conducted in the manner specified in the act to regulate commerce it is subject to its provisions.

The movement does not begin until the articles have been shipped or started in their transportation;⁶⁸ the preparation of the article for transportation is not sufficient;⁶⁹ nor the intent to transport;⁷⁰ it must be actually delivered to the carrier for transportation.⁷¹

Commodities cease to be interstate commerce when they have been so acted upon that they have been incorporated in and mixed with other property of the State;⁷² some decisions hold that a shipment is incorporated into the property of the State when it has been delivered to the consignee;⁷³ others go so far as to hold that it is required that some of the goods shall have been sold after they have arrived within the State of their destination; whether or not sale of the goods is a requirement, it is clear that a sale of a part or all of the goods in

⁶⁶ Particularly cases involving demurrage, track storage, terminal charges, and the like, as sec. 6, as amended by the act of June 29, 1906, provides that the schedules shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee."

⁶⁷ *Gilman v. Philadelphia* (3 Wall., 724), *The Daniel Ball* (10 Wall., 557), *Coe v. Errol*, (116 U. S., 517), *R. R. v. Penn.* (136 U. S., 114), *R. R. v. Penn.* (145 U. S., 192), *U. S. v. Knight* (156 U. S., 13).

⁶⁸ *Coe v. Errol* (116 U. S., 517).

⁶⁹ *U. S. v. Boyer* (85 Fed., 425).

⁷⁰ *Coe v. Errol* (116 U. S., 517).

⁷¹ *U. S. v. Boyer* (85 Fed., 425).

⁷² *Gibbons v. Ogden* (9 Wheat, 1), *Brown v. Md.* (12 Wheat., 419), *Welton v. Mo.* (91 U. S., 275), *Howe Mach. Co. v. Gage* (100 U. S., 676), *Tiernan v. Rinker* (102 U. S., 123), *Brown v. Houston* (114 U. S., 622), *Robbins v. Shelby County Taxing Dist.* (120 U. S., 489), *Emert v. Mo.* (156 U. S. 292).

⁷³ *Bowman v. Railroad* (125 U. S., 456), *Rhodes v. Iowa* (170 U. S., 412), *Leisy v. Hardin* (135 U. S., 100), *Vance v. Vandercreek* (170 U. S., 438).

the State where they are destined and delivered destroys their character as interstate commerce.

Sec. 40. Questions which the Commission will not determine.—The Commission early held that it would not express opinions on abstract questions, nor on questions presented by *ex parte* statements of facts nor on questions of the construction of the statute where no controversy was pending before it on complaint of violation of the law.⁷⁴ So, it will not undertake to say whether or not it is proper for carriers to grant free transportation to those who are said to be proper subjects of charity;⁷⁵ but it has recently interpreted by administrative rulings and without formal complaint⁷⁶ the pass provision. If, during a proceeding brought to test the reasonableness of rates, the defendant reduces the charge to the amount asked, the Commission will not, even at the request of the parties, consider and pass upon the question, whether or not the rates complained of were excessive, because the question would be purely a speculative and abstract one.⁷⁷ Where a tariff complained of had long since been abandoned and discontinued, the Commission held that there was nothing it could do in the direction of ordering the carriers to cease and desist from enforcing it.⁷⁸

The Commission, as an administrative body, will not determine the constitutionality of any provision of the law but presumes it to be valid; such was held from the bench in the matter of the liability of carriers under section 20 (so-called Carmack amendment).

One may raise constitutional questions before the Commission but the determination of them must be had in the courts.

A full knowledge of facts is essential to a decision:

INSTANCE.—In *Howell v. N. Y. L. E. & W. R. Co.* (2 I. C. C., 272) the Commission stated that it could not decide the question of reasonable rates without full knowledge of all the facts concerning the particular traffic in question and its relation to the other traffic of the carrier.

Frequently by reason of a want of evidence in support of alleged facts, the Commission is precluded from making a determination of the question:

INSTANCE.—In *Re Alleged Unlawful Charges, etc.* (8 I. C. C., 585) where in a proceeding instituted upon its own motion there had been allegations of unreasonable rates and an investigation held, but the evidence was uncertain and inconclusive, it was held that the Commission could not make the necessary comparisons or arrive at a definite conclusion.

⁷⁴ *Re* Petition of Trad. and Trav. Union (1 I. C. C., 8), *P. Co. v. L. N. A. & C. R. Co.* (3 I. C. C., 223).

⁷⁵ *Re* Disabled Soldiers and Sailors (1 I. C. C., 28).

⁷⁶ Rules 63, 64, 65, and 66; Tariff Circular No. 15-A.

⁷⁷ *Bishop v. Duval, receiver* (3 I. C. C., 128), *P. Co. v. L. N. A. & C. R. Co.* (3 I. C. C. 223).

⁷⁸ *Rawson v. N. N. & M. V. Co.* (3 I. C. C., 266).

In *Rice v. L. & N. R. Co.* (1 I. C. C., 503) it was held that when an important question is raised by the pleadings and the determination of it will affect others quite as much as the defendant and the parties before the Commission give their attention almost exclusively to questions other than the one mentioned and there is no attempt to supply the Commission with information to enable the question to be understandingly determined the Commission will decline to decide it, largely upon the ground that it affects parties not before the Commission and leave the complaint to raise the question in another proceeding.

Questions may not be determined by reason of lack of jurisdiction:

INSTANCE.—In *Councill v. W. & A. R. Co.* (1 I. C. C., 339) it was held that the Commission would not go into the question of money damages when the claim present was in the nature of an action of trespass, for the reason that the carrier was constitutionally entitled to a trial by jury in such a case. And where a claim for pecuniary damages presents a case at common law the Commission refused to award reparation. (*Heck v. E. T. V. & G. R. Co.* 1 I. C. C., 495.)

In *K. & I. B. Co. v. L. & N. R. Co.* (2 I. C. C., 162) the Commission declined to express an opinion upon the question of rates as between two carriers when one of the carriers is not a party to the proceeding.

In *Duncan v. A. T. & S. F. R. Co.* (6 I. C. C., 85) it was held that the remedy of one for injury to goods shipped resulting from delay, deterioration, loss, breakage, rotting, or other deterioration or damage not attributable to a violation of any provision of the act to regulate commerce is by appropriate action in the courts and not in a proceeding before the Commission. But see the provisions of section 20 respecting initial carrier liability and the remedy given by sections 8 and 9. If the carrier complies with the provisions of section 20 and loss, damage and injury occur to the property, the jurisdiction of the Commission to award damages therein must be doubted; but if the carrier fail to issue such a bill of lading as is required by the provisions of section 20 and loss, damage and injury result the Commission may have jurisdiction to entertain a complaint alleging violation of the act and to award reparation to the complainant, although no such case has been brought.

In *Commercial Club v. C. R. I. & P. R. Co.* (6 I. C. C., 647) the Commission held that matter not expressly put in issue by the pleadings or necessarily involved in the issues presented can not be authoritatively determined by the Commission and no opinion would be expressed.

In *R. Com. v. L. & N. R. Co.* (10 I. C. C., 173) the Commission declined to enforce a provision of the Constitution of the State of Kentucky on the ground that its jurisdiction did not extend thereto and that it had no jurisdiction other than that conferred by the act to regulate commerce.

In *LaS. & B. C. R. Co. v. C. & N. W. R. Co.* (13 I. C. C., 610) it was held that the jurisdiction of the Commission does not extend to claims *ex contractu*, and consequently it cannot order the payment of money for services performed, nor for a debt due one carrier to another on account of joint rates for a joint service; affirmed in *General Electric Co. v. N. Y. C. & H. R. R. Co.* (14 I. C. C., 237).

In *Manning v. C. & A. R. Co.* (13 I. C. C., 125) held that the Commission would not undertake to adjudicate matters between a railway and one of its stockholders, where the subject of controversy was of no public importance.

In *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266) held that the Commission has no jurisdiction over pooling of freight by water carriers.

Sec 41. Comity between the Interstate Commerce Commission and State commissions.—It not infrequently happens that rates prescribed for intrastate traffic by a State commission become part of the interstate rate; this is usually the case where a rate-making basis is at a State line, for the interstate rate “makes” to the basing point plus the intrastate rate to destination. Where such an interstate rate is attacked on the ground of its unreasonableness the Commission will not undertake to determine as to the reasonableness of the portion of the rate which is exacted for the transportation within the State, but will consider the reasonableness of the rate as a whole; it will nevertheless respect the rulings and the rates prescribed by the State commission in so far as is inconsistent with the administration of the Federal act to regulate commerce.

Decisions of State railway commissions are entitled to consideration, but they are not conclusive on the Interstate Commerce Commission:

INSTANCE.—In *Marshall Oil Co. v. C. & N. W. R. Co.* (14 I. C. C., 210) the Commission said: “The decisions of the several State railroad commissions are worthy of consideration, but we are not justified under the law in accepting a comparison of lower intrastate rates prescribed by the State authorities with those applying on interstate traffic as conclusive of the unreasonableness of the interstate rates.”

In *Corn Belt Meat Producers Assn. v. C. B. & Q. R. Co.* (14 I. C. C., 376) the Commission, being urged to determine concerning State and interstate rates, said: “There are many reasons why State and interstate rates should be established in harmony with one another. It is especially unfortunate that the sum of the State locals should form a less combination than the through interstate rates. Railway rates depend on local conditions and necessities with which State commissions are often better acquainted than a National commission possibly can be. When, therefore, we are asked to examine the reasonableness of an interstate rate similar rates established by State authority in that territory must have great influence, especially where they have been long acquiesced in by the carriers. In the present instance the Illinois rates have been in effect for more than a quarter of a century, and the Iowa rates have prevailed for an almost equal period, until slightly reduced last year by the Iowa commission. During all this time the carriers have accepted these rates. It is impossible not to be strongly influenced toward the view that such rates are just and reasonable.

“Still these State rates have no binding force upon us. They are standards of comparison of greater or less value, according as they appear to be just and reasonable. This Commission has several times refused to recognize the reasonableness of State rates, even when those rates were directly in issue, holding that a through interstate rate might properly be higher than the sum of the State locals. (*Savannah Bureau, etc. v. C. & S. R. Co.*, 7 I. C. C., 601; *Artz v. S. A. L. R. Co.*, 11 I. C. C., 458; *Brabham v. A. C. L. R. Co.*, 11 I. C. C., 464). The defendants insist that these State rates are unreasonably low, and it is therefore our duty to examine that question as an original proposition.”

In *Leonard v. C. & A. R. Co.* (3 I. C. C., 241) where it was shown that certain practices had received the sanction of State laws or rulings of State commissions and it was urged that the Commission should conform thereto, not only because the State action must be held *prima facie* just and right, but also because the

interstate shipper would be placed at a disadvantage relatively to the intrastate shipper, if another rule be applied, the Commission said: "The Commission will always in the discharge of its duties pay the highest deference and respect to State action. It appreciates as fully as any one possibly can the importance of all laws and all action on the subject of railroads and their work being harmonious. The Commission can not ignore the fact, however, that the people of the United States in framing their Constitution conferred upon the Congress the power to regulate commerce between the States. The power was not restricted in the grant, or made subject to any condition whatever; it is therefore full and complete, and any State action that would limit or hamper it would obviously be an encroachment upon the domain of Federal authority. Neither of the States named would make any question of this; nor would their public authorities prescribe any rule or make any order that should in express terms apply to interstate commerce." * * * State action "is entitled to respect, and we should examine it in any case in the expectation of finding ourselves in full accord with it."

In *Brabham v. A. C. L. R. Co.* (11 I. C. C., 464) it was held that the rates fixed by the State commissions of South Carolina and Georgia are presumptively reasonable, but such presumption is not conclusive and the railroad companies are entitled to show the contrary in a case involving the rates on interstate traffic.

Sec. 42. Comity between the Commission and the courts.—Where a controversy is properly pending in a court having jurisdiction in the premises the Commission will not take cognizance of the case. Thus where a complaint alleging unreasonable rates and asking reparation had been filed with the Commission, and pending decision the rates had been reduced, and claim for refund had been made to the court which appointed the receiver of the carrier the Commission declined to determine what was a reasonable rate for the reason that it was an abstract question and also because the matter was before the court.⁷⁹

When a question has been decided by the Supreme Court the Commission, of course, considers itself bound thereby; but if the precise point has not been decided in the opinion, or probably if the point be *obiter*, the Commission can not be bound in that respect.

Commission is not bound by *obiter* opinion of the courts:

INSTANCE.—In *Cary v. E. S. R. Co.* (7 I. C. C., 286) the Commission quoted from two Supreme Court decisions as follows: "Under the interstate commerce act the Commission has no power to prescribe the tariff of rates which shall control in the future" (*I. C. C. v. C. N. O. & T. P. R. Co.*, 167 U. S., 479) and, "the reasonableness of the rate in a given case depends on the facts, and the function of the Commission is to consider the facts and give them their proper weight." (*C. N. O. & T. P. R. Co. v. I. C. C.*, 162 U. S., 184). After quoting from the above cases the Commission said: "Under the law so construed, the Commission has power to say what in respect to the past was unreasonable and unjust; but as to rates complained of as unreasonable, unjust and unlawful, and so found to be in the case under consideration the Commission can make no provision or order for their reduction which the courts are required to enforce or the carriers are obliged to obey."

⁷⁹ *Bishop v. Duval*, receiver (3 I. C. C., 128).

Pendency of suit in court will not prevent an order of the Commission—

INSTANCE.—In *Keith v. K. C. R. Co.* (1 I. C. C., 189) it was held that where suit is pending in Federal courts involving to some extent the question presented by the petition to the Commission the pendency of the suit will not be deemed sufficient reason for the Commission declining to make an order, when it is seen that the judgment of the court when rendered will not necessarily cover the ground of the petition and leave was given either party to apply for a modification of the order should such be necessary to make it conform to the judgment of the court when rendered.

In *Bishop v. Duval*, receiver (3 I. C. C., 128) it was held that where the question whether rates paid ought to be refunded had been presented to a judicial tribunal where it is pending the Commission would not take cognizance of it. But the fact of a receivership subsequent to a complaint should not interfere with the progress of the proceeding before the Commission. (*R. Com. v. Clyde S. S. Co.*, 5 I. C. C., 324.)

In *Loud v. S. C. R. Co.* (5 I. C. C., 529) it was held that the question whether property of a carrier in the hands of a receiver appointed after matters complained of before the Commission are alleged to have occurred is subject to an order of reparation by the Commission is one to be presented to and disposed of by the courts.

nor prevent rehearing by the Commission—

INSTANCE.—In *Southern P. & G. Co. v. L. E. & W. R. Co.* (6 I. C. C., 284) where it appears that the discriminations and preferences complained of in a case would be removed through compliance, by carriers operating in the same territory, with the decision and order of the Commission in other cases, and that suits are pending in the Federal courts for the enforcement of the order in such other cases, the proceedings before the Commission were stayed until final determination by the courts.

but a proceeding may be stayed temporarily:

INSTANCE.—In *Page v. D. L. & W. R. Co.* (6 I. C. C., 548) the Commission held that it was not precluded from rehearing a particular case and amending or modifying its original order by the refusal of the circuit court of the United States to enforce the original order, especially when the reasons assigned for the refusal of the court did not relate to the principal question in controversy and are consistent with an approval of the amended or modified order.

The Commission gives such weight as is proper to the decisions of the circuit and district courts in matters concerning interstate commerce and the act; it does not, however, feel itself bound by such decisions, except in a case where the opinion of the Commission is reviewed, for the reasons that the facts are different and generally involve a different territory where other commercial conditions are present than in the case decided by the court. Thus, where in a case involving the distribution of cars to coal mines, the Commission did not consider that rules laid down by the court should be applied.⁸⁰

⁸⁰ *Royal C. & C. Co. v. S. R. Co.* (13 I. C. C., 440).

CHAPTER III

ADDITIONAL POWERS AND DUTIES OF COMMISSION UNDER ACT TO REGULATE COMMERCE

Sec. 43. Additional powers and duties of the Commission.—The original act to regulate commerce¹ gave to the Commission certain powers and imposed upon it certain duties which are not ordinarily conferred upon courts or judicial tribunals. These powers have been considered by the Congress to be essential to assist the Commission in the performance of its duties and to secure the correction of the evils of railway management. The original act contained many powers and duties which are administrative, executive, auxiliary, regulative, and supervisory, and additional similar powers were conferred both by the Elkins' law (act Feb. 19, 1903, 32 Stat. L., 847) and the last amendment to the interstate commerce act (act June 29, 1906, 34 Stat. L., 584).

Sec. 44. Executive and administrative duties—

DUTY TO EXECUTE AND ENFORCE THE ACT

By section 12 of the act the Commission is "authorized and required to execute and enforce the provisions of this act." The Supreme Court in *I. C. C. v. C. N. O. & T. P. R. Co.* (167 U. S., 479), referring to this power, said: "The power is partly judicial and partly executive and administrative." It is the manifest duty and obligation of the Commission to enforce reasonable rates,² or other affirmative provisions of the act and to prevent the accomplishment of the negative provisions. It is not too much to say that this duty to execute and enforce the act supplies one of the chief reasons for the existence of the Commission; were there no special governmental agency charged with executing and enforcing the provisions of the acts to regulate commerce, or were individuals compelled to proceed in the courts to secure rights granted by the act, it is clear that the

¹ Act Feb. 4, 1887 (24 Stat. L., 379).

² *Perry v. F. C. and P. R. Co.* (5 I. C. C., 97), *Milk Producers' Assn. v. D. L. and W. R. Co.* (7 I. C. C., 92), re *Alleged Excessive Freight Rates, etc.* (4 I. C. C., 116). But the power to "execute and enforce" does not by implication give the power to make rates for the future (*I. C. C. v. C. N. O. and T. P. R. Co.*, 167 U. S., 479). Nor will this language and the other provisions of section 12 authorize the Commission to institute a suit in the courts to enjoin discriminations against localities (*M. P. R. Co. v. U. S.*, 189 U. S., 274).

correction of transportation abuses would be not only less easily accomplished but also with a greater expenditure of private funds.

MODIFICATION OF NOTICE IN CHANGE OF RATES

The Commission is given authority, in its discretion and for good cause shown, to permit changes of rates in less than the statutory period of thirty days.³

MEANS FOR ENFORCING ACT

The Commission is given authority in section 12 to apply to district attorneys, asking that they institute and prosecute in appropriate courts all necessary proceedings for the enforcement of the act and for the punishment of the violations of it. The authority of the Commission thus to complain of the violations of the act was questioned in *U. S. v. M. P. R. Co.* (65 Fed., 903), and the court, in sustaining the authority, said:

It must be kept in view steadily that the object of the creation of this Commission was not merely to afford, as was supposed, a ready method of settling controversies between individual shippers and the common carriers, but it had a far wider sweep and higher scope and design, which was by affirmative action on the part of the Commission, on its own motion, to have instituted and carried through proceedings for the correction of abuses and the righting of wrongs, which affected the public commercial interests; and this even without the intervention of individual litigants at all (but see 189 U. S., 274).

The Commission is also given authority under section 20 to request the Attorney-General to proceed in the Federal courts by mandamus, commanding carriers to comply with the provisions of the statute.⁴

PROHIBITING VIOLATIONS OF ELKINS LAW

The Elkins law (act of Feb. 19, 1903, 32 Stat. L., 847) provides in section 3, that—

Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction;

and the court is authorized to enforce an observance of the public tariffs or direct and require the discontinuance of the discrimination

³ The Commission has exercised this discretion frequently and has prescribed a general rule requiring certain changes. (See Tariff Circular No. 15-A, items 54, 55, and 56, Appendix).

⁴ Jurisdiction to issue writs of mandamus to compel obedience to the provisions of the act respecting filing of reports was not conferred by the original act (*U. S. ex rel. v. L. S. & M. S. R. Co.*, 197 U. S., 536). This jurisdiction is now, by section 20, specifically conferred upon circuit and district courts of the United States.

by proper writs. The same section permits the Commission to ask the Attorney-General to direct the district attorneys to institute and prosecute such proceedings.⁵

Sec 45. Supervisory and regulatory powers—

REPORTS FROM CARRIERS

The Commission is given authority by section 20 to require annual reports from carriers subject to the act, and from owners of railroads engaged in interstate commerce. It may also prescribe the manner in which these reports shall be made, and require from the carriers specific answers to all questions upon which the Commission may need information. The statute provides specifically for the contents of these reports. (See sec. 20, par. 1, Appendix.)

DUTIES RESPECTING ACCOUNTS OF COMMON CARRIERS SUBJECT TO ACT

It is provided by section 20 of the present law that the Commission shall have access to the accounts, records and memoranda kept by the carriers subject to the act; also that it may prescribe a uniform system of accounting, the form of accounts, and the manner of keeping accounts. It may, under the provisions of this section, employ special agents or examiners, and by an order these employees have authority to inspect and examine any and all accounts, records, and memoranda kept by the carriers.

The Commission has authority, under the same section, to require from carriers monthly reports and special reports, the latter covering such periods of time as the Commission may specify.

These reports contain in detail, under the rules provided by the Commission, receipts and expenditures, amount of capital, outstanding bonds, and other information statistical in its nature from which may be deduced figures valuable in ascertaining the cost of carriage upon a particular road, also comparisons between various roads.

FORM OF SCHEDULES

The Commission, in section 6, is authorized to determine the form in which schedules (passenger and freight tariffs) shall be made, and it is given authority to modify the requirements of the law as to the publishing, posting, and filing of rates. The object of this is to simplify tariffs of rates and thereby make them more certain and their evasion more difficult.

⁵ Prior to the passage of the Elkins law, the Federal courts had no jurisdiction to enjoin discriminations (*M. P. R. Co. v. U. S.*, 189 U. S., 274). The language of section 3 of the Elkins law, indicating a present and existing violation of the law, can the Commission proceed in court to enjoin a rate or practice not in force and effect?

SAFETY OF SWITCH CONNECTIONS

The Commission is required, upon complaint of a shipper that the carrier has refused to maintain the switch connection, to hear and investigate the petition and to "determine as to the safety and practicability thereof." (Sec. 1.)

Sec. 46. Auxiliary powers of the Commission.—

AID OF COURT IN REQUIRING ATTENDANCE OF WITNESSES, ETC.

The Commission or any party to the proceeding before the Commission, when there has been a disobedience to a subpoena, may invoke the aid of any court of the United States to require the attendance and testimony of witnesses and the production of documentary evidence (sec. 12). This provision was held constitutional in *I. C. C. v. Brimson* (154 U. S., 447).⁶ There can be no punishment for contempt before the Commission, therefore the Commission is given authority to invoke the aid of a court to compel the attendance of witnesses and the giving of testimony.

AUTHORITY TO INQUIRE INTO MANAGEMENT OF CARRIERS

The statute gives the Commission "authority to inquire into the management of the business of all common carriers subject to the provisions" of the act (sec. 12). This language has been broadly construed both by the Commission and by the courts⁷ and has been the authority for general investigations by the Commission on its own motion.

EMPLOYMENT OF SPECIAL COUNSEL

The Commission may, with the consent of the Attorney-General employ special counsel for the purpose of conducting any proceeding under the act (sec. 16).

SPECIAL AGENTS OR EXAMINERS

The Commission is authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence (sec. 20).

EMPLOYEES

The Commission is authorized to hire employees and fix their compensation (sec. 16), but in its annual report to Congress the names and compensation of employees shall be given (sec. 21).

⁶ *Re Alleged Excessive Freight Rates, etc.* (4 I. C. C., 116), the Commission said: "The Commission not being a court, an attorney at law can have immunity from the legal penalties of contempt, and accuse it of misstating and perverting testimony."

⁷ *I. C. C. v. D. G. H. & M. R. Co.* (57 Fed., 1005).

CHAPTER IV

DUTIES AND POWERS OF COMMISSION UNDER ACTS OTHER THAN ACTS TO REGULATE COMMERCE

Sec. 47. Authority and duties of the Commission under acts other than the interstate commerce acts.—The Commission since its organization has served as a convenient repository for the exercise of Federal authority over carriers engaged in interstate commerce. The several acts conferring authority are not amendatory of or supplementary to the act to regulate commerce but stand independently. Wherever the Congress has desired to exercise a supervision and control over carriers engaged in interstate commerce, particularly carriers by rail, it has almost uniformly conferred upon the Commission the power to investigate, oversee, and regulate the manner of operation and other details.

The acts by which various duties and powers have been given to the Commission are:¹

(a) An act supplementary to the act of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and also of the act of July 2, 1864, and other acts amendatory of said first-named act, approved August 7, 1888 (25 Stat. L., 382; 1 Supp. R. S., 602).

(b) The act of Mar. 3, 1903, to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes, amending the act of March 2, 1893, upon the same subject and which had been changed by an act of April 1, 1896 (27 Stat. L., 531; 2 Supp. R. S., 102, as amended by act approved Apr. 1, 1896, 29 Stat. L., 85; 2 Supp. R. S. 455; 32 Stat. L., 943, 444).

(c) Directing the Interstate Commerce Commission to investigate and report on block-signal systems and appliances for the automatic control of railway trains, approved June 30, 1906 (34 Stat. L., 838).

(d) To grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes, approved February 28, 1902 (32 Stat. L., 43).

(e) An act requiring common carriers engaged in interstate commerce to make

¹For the powers and duties conferred by each act see sections following.

full reports of all accidents to the Interstate Commerce Commission, approved March 3, 1901 (31 Stat. L., 1446).

(f) Joint resolution instructing the Interstate Commerce Commission to make examinations into the subject of railroad discriminations and monopolies in coal and oil, and report on the same from time to time, approved March 7, 1906 (34 Stat. L., 823).

(g) An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon, approved March 4, 1907 (34 Stat. L., 1415).

(h) An act authorizing certain extensions to be made of the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Company, in the District of Columbia, and for other purposes, approved May 23, 1908 (35 Stat. L., 246).

(i) An act to promote the safety of employees on railroads, approved May 30, 1908 (35 Stat. L., 476).

(j) An act to promote the safe transportation in interstate commerce of explosives and other dangerous articles, and to provide penalties for its violation, approved May 30, 1908 (35 Stat. L., 554).

Sec. 48. Authority and duty of Commission under act of August 7, 1888 (25 Stat. L., 382; 1 Supp. R. S., 602).—This act is supplementary to the act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean (acts of July 1, 1862, and July 2, 1864). By section 3 of the act of 1888 it is provided that if any railroad or telegraph company to which has been granted a subsidy in lands or bonds or loan of credit for their construction shall refuse or fail to maintain a railroad or telegraph line and to operate the same as provided by law for the use of the Government or the public without discrimination, or shall fail or refuse to make and continue to arrange for the interchange of business with connecting companies, then any persons, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission; and it is made the duty of the Commission, under such rules and regulations as it may prescribe, to determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company shall abide by and perform the order. Notice of the determination and order is to be given to the parties concerned and the Commission is given power to enforce obedience to its order by writ of mandamus in the United States courts on the relation of any of the Commissioners. Authority is given to the Commission to institute an inquiry upon their own motion in the same manner and to the same effect as though complaint had been made.

Each of the railroad and telegraph companies subject to this act of 1888 and the original acts is required, by section 6, to report to the Interstate Commerce Commission with reasonable fullness and certainty "the nature, extent, value, and condition of the telegraph lines and property then belonging to it, the gross earnings, and all

expenses of maintenance, use, and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year." The Commission shall prescribe the time when and the manner in which these reports shall be filed.

Section 6 also provides that it shall be the duty of the railroad and telegraph company, subject to the act "to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated."

Pursuant to this act the Commission, by circular letter of August 26, 1888, urged upon the carriers subject to the act compliance with its provisions respecting the filing of contracts and agreements with the Commission and also reporting to what extent and in what manner the provisions of section 1 of the act [relating to the construction, maintenance, and operation of telegraph lines on subsidized railroads] had been complied with.²

Many of the carriers subject to the act neglected to make reports and the Commission informed the Attorney-General, in accordance with the act, that he might proceed to deal with the cases as he should deem necessary.³ Subsequently, suit was brought by the United States against the Union Pacific Railway Company and Western Union Telegraph Company under this act to compel compliance with its provisions, and for the annulment of certain agreements between the two companies. Under decree of the United States Circuit Court for the District of Nebraska the agreements between the railroad and telegraph company were annuled and held for naught, and the telegraph company was directed to vacate all the offices of the railway company, but it was provided that the decree should not be construed as preventing the railway company from leasing its lines to the telegraph company (50 Fed., 28). Upon appeal, the Circuit Court of Appeals reversed the decree in part (59 Fed., 813). The decision of the Circuit Court of Appeals was reversed and the decree of the circuit court affirmed by the Supreme Court (160 U. S., 1).⁴

² 2d Ann. Rept., 187.

³ 4th Ann. Rept., 49; 5th Ann. Rept., 9; 6th Ann. Rept., 67; 7th Ann. Rept., 77; 8th Ann. Rept., 77.

⁴ See also *U. S. v. N. P. R. Co.* (120 Fed., 546).

Under the authority conferred upon the Commission by this act one formal case has been filed with the Commission (I. C. C. Docket, 602), which was subsequently dismissed on motion of counsel for plaintiff.⁵

Sec. 49. Authority of Commission under safety-appliance acts.⁶—The original act provided in section 4 that after July 1, 1895, it should be unlawful for any railroad company to use any car in interstate commerce which is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars; and this provision was to continue until otherwise ordered by the Commission. The act also provided in section 5 that upon recommendation of the American Railway Association the Commission might give notice by such means as it deemed proper to all carriers engaged in interstate commerce of the standard height of draw-bars for freight cars. The act prohibited (sec. 6), under a penalty of \$100 for each violation, a carrier from using any locomotive other than as prescribed by the act and it is made the duty of the Interstate Commerce Commission to lodge with proper district attorneys information concerning violations of the act which may come to its knowledge. Power is also given in section 7 to the Interstate Commerce Commission to extend the period within which the carriers shall comply with the provisions of the law.

The amending act of March 2, 1903, in section 2, gave the Commission power after full hearing to increase the minimum percentage of cars required to be operated with power or train brakes.

The Commission is required by the sundry civil act of 1906 "to examine all mail cars used on any railroad in the United States" and to report on their construction, adaptability, design, and condition.

The safety appliance acts have been construed by the courts in the following cases: *C. M. & St. P. R. Co. v. Voelker* (129 Fed., 522), *Crawford v. N. Y. C. & H. R. Co.* (10 Am. Neg. Rep., 166), *Johnson v. S. P. Co.* (117 Fed., 462), *Johnson v. S. P. Co.* (196 U. S., 1), *P. & R. Co. v. Winkler* (4 Pennewill (Del.), 387), *Schlemmer v. B. P. & R. Co.* (205 U. S., 1), *U. S. v. A. T. & S. F. R.* (150 Fed., 442), *U. S. v. C. M. & St. P. R. Co.* (149 Fed., 486), *U. S. v. C. P. & St. L. R. Co.* (143 Fed., 353), *U. S. v. E. P. & S. W. Co.* (District Court, Arizona, Jan. 3, 1907), *U. S. v. E. P. & S. W. R. Co.* (Western District of Texas, Apr. 8, 1907), *U. S. v. G. N. R. Co.* (145 Fed., 438), *U. S. v. G. N. R. Co.* (150 Fed., 229), *U. S. v. Geddes* (District Court, Southern District of Ohio, Aug. 13, 1903), *U. S. v. Geddes* (131 Fed., 452), *U. S. v. I. H. R. Co.* (Northern District of Illinois, Nov. 20, 1906), *U. S. v. N. P. T. Co.* (144 Fed., 861), *U. S. v. P. C. C. & St. L. R. Co.* (143 Fed., 360), *U. S. v. S. P. Co.* (District of Oregon, Apr. 1, 1907), *U. S. v. S. R. Co.* (135 Fed., 122), *Voelker v. C. M. & St. P. Co.* (116 Fed., 867),

⁵ 15th Ann. Rept., 19; 16th Ann. Rept., 21.

⁶ Act of Mar. 2, 1893 (27 Stat. L., 531; 2 Supp. R. S., 102), as amended by act of Apr. 1, 1896 (29 Stat. L., 85; 2 Supp. R. S., 455), and as amended by act of Mar. 2, 1903 (32 Stat. L., 943), and act of June 28, 1902 (32 Stat. L., 444).

Winkler v. P. & R. R. Co. (53 Atl., 90), U. S. v. Belt R. Co. (161 Fed., —), U. S. v. C. & N. W. R. Co. (District of Colorado, Nov. 25, 1907), M. P. R. Co. v. Brinkmeier (Supreme Court of Kansas, Apr. 6, 1907), Missouri ex rel. v. M. P. R. Co. (Supreme Court of Missouri, June 6, 1908), U. S. v. St. L. I. M. & S. R. Co. (District Court, Western District of Tennessee, June 11, 1907), U. S. v. I. C. R. Co., 2 cases (District Court Western District of Kentucky, Nov. 1, 1907), U. S. v. W. R. Co. (District Court, Eastern District of Illinois, Nov. 19, 1907), U. S. v. C. R. I. & P. R. Co. (District Court, Western District of Missouri, Feb. 21, 1908), U. S. v. Union Stock Yards of Omaha (District Court of Nebraska, Feb. 21, 1908), U. S. v. L. V. R. Co. (District Court, Eastern District of Pennsylvania, Mar. 17, 1908), U. S. v. P. & R. R. Co. (District Court, Eastern District of Pennsylvania, Mar. 17, 1908), U. S. v. P. R. Co. (District Court, Eastern District of Pennsylvania, Mar. 18, 1908), U. S. v. C. G. W. R. Co. (District Court, Northern District of Iowa, May 6, 1908), U. S. v. W. & L. E. R. Co. (District Court, Northern District of Ohio, June 16, 1908), U. S. v. P. C. R. Co. (District Court for Southern District of California, June 13, 1908), U. S. v. A. T. & S. F. R. Co. (District Court for the Southern District of California, June 6, 1908), U. S. v. T. R. Assn. of St. L. (District Court for the Eastern District of Missouri, June 3, 1908), U. S. v. O. S. L. R. Co. (District Court for the District of Idaho, June 4, 1908), U. S. v. C. H. & D. R. Co. (District Court, Northern District of Ohio, June 24, 1908), U. S. v. A. T. & S. F. R. Co. (District Court, Fourth District of Arizona, July 17, 1908), U. S. v. D. & R. G. Co. (Circuit Court of Appeals for Eighth Circuit, Aug. 22, 1908), U. S. v. A. T. & S. F. R. Co. (Circuit Court of Appeals for the Eighth Circuit, August 22, 1908).

Under the safety appliance acts the Commission has provided the percentage of cars which must be equipped with air brakes, height of grab irons, and made rules and regulations for the equipment of cars in interstate commerce. A considerable force of inspectors is engaged in examining trains in interstate commerce and reporting the number of defective cars. Several suits have been brought against carriers for violations of the provisions of the act.⁷

Sec. 50. Authority of Commission to investigate and report on block signal systems.—Under joint resolution of June 30, 1906 (34 Stat. L., 838) the Commission is authorized and directed to investigate and report on the use and necessity for block-signal systems and appliances

⁷ 7th Ann. Rept., p. 265; 8th Ann. Rept., p. 75; 9th Ann. Rept., p. 91; 10th Ann. Rept., p. 93; 11th Ann. Rept., p. 127-131; 12th Ann. Rept., p. 86-90; 13th Ann. Rept., p. 50-54; 14th Ann. Rept., p. 76-85; 15th Ann. Rept., p. 62-78; 16th Ann. Rept., p. 57-62; 17th Ann. Rept., p. 84-96; 18th Ann. Rept., p. 90-97; 19th Ann. Rept., p. 71-76; 20th Ann. Rept., p. 70-72; 21st Ann. Rept., p. 132-139. In these several reports the Commission reviews its authority respecting safety appliances and the decisions of the courts under the statute. *Re Safety of Employees and Travellers*, etc. (6 I. C. C., 332), *Evans v. U. P. R. Co.* (6 I. C. C., 520), *re Application of C. & A. R. Co. et al. for Extension of Time for Compliance with Safety Appliance Act* (8 I. C. C., 643), *re Application of Certain Carriers*, etc. (8 I. C. C., 662; 9 I. C. C., 522), *re Proposed Increase in Minimum Percentage of Cars*, etc. (11 I. C. C., 429). In the 19th Ann. Rept. (p. 71), the Commission said: "Within the past year a decided improvement has taken place in the condition of safety appliances on all railroads subject to the provisions of the statute, and at no time since the safety-appliance law became effective have the results of its operation been so satisfactory as at present."

for the automatic control of railway trains. In transmitting its report to the Congress the Commission is to recommend such legislation as it deems advisable. Under this act the Commission is given power to issue subpoenas, administer oaths, examine witnesses, require the production of books and papers, and receive depositions taken before any proper officer.

Under this resolution the Commission conducted an investigation and submitted a report to the Congress on February 23, 1907. The Commission recommended supplemental legislation for the purpose of supervising and conducting experimental tests of safety devices and an appropriation of \$50,000 was made for the purpose.

After a conference with officials in charge of operating departments of railways a board was appointed to continue the investigation; this board has considered a number of devices and systems but its report has not, as yet, been published (21st Ann. Rept., 122).

Sec. 51. Authority of Commission to approve certain interlocking or automatic signals at crossings.—The act (32 Stat. L., 43) to grant a right of way through Oklahoma Territory and Indian Territory to the Enid and Anadarko Railway Company provided in section 18 for the approval by the Commission of interlocking or automatic signals at crossings at common grade and to grant permission for the use thereof if the system of works and fixtures are, in the opinion of the Commission, sufficient and proper.

Nothing appears to have been done by the Commission under this act, the authority therein conferred having been absorbed by the resolutions concerning block signal systems. (See sec. 50.)

Sec. 52. Authority of Commission respecting accident reports of carriers engaged in interstate commerce (31 Stat. L., 1446).—All railroads engaged in interstate commerce are required to report to the Commission, monthly, accidents (sec. 1); the report stating the nature and cause of the accidents and the circumstances connected therewith; but these reports are not to be used in evidence against the carrier (sec. 3). The form of report and the method is to be prescribed by the Interstate Commerce Commission (sec. 4).

Under this statute the Commission has held hearings, provided forms for reports of accidents, and taken effective measures to insure that none of the information contained in the reports shall be divulged, except through the formal reports of the Commission.*

“The primary object of the statute,” said the Commission in the 15th Annual Report (p. 79) “is, obviously, to promote the safety of passengers and of railroad employees; and this object is to be accomplished, so far as these records can accomplish it, by making the most instructive exhibit possible of those acci-

* 15th Ann. Rept., pp. 78, 293; 16th Ann. Rept., p. 162; 17th Ann. Rept., pp. 96, 107; 18th Ann. Rept., pp. 97-105; 19th Ann. Rept., pp. 13, 14; 20th Ann. Rept., pp. 68-70; 21st Ann. Rept., pp. 127, 155-156.

dents which are preventable. Experience has shown that some classes of accidents, including many personal casualties in which the person injured is himself chiefly at fault, occur in such uniform percentages, year after year, in proportion to the total number of persons employed (or, in the case of passengers, to the total number transported), that they may be looked upon as unavoidable.”

Sec. 53. Authority of Commission under joint resolution to make examinations into railroad discriminations and monopolies in coal and oil (34 Stat. L., 823).⁹—The Commission under joint resolution of March 7, 1906, is instructed to examine into the subject of railroad discriminations in coal and oil and to report concerning:

(a) Inter corporate stock ownership; (b) ownership of officers of carriers in coal and oil lands and coal and oil traffic; (c) whether there is any combination or trust in restraint of trade or monopoly in coal and oil traffic; (d) the system of car distribution in effect on railway lines engaged in the interstate transportation of coal and oil; (e) and any facts or conclusions which the Commission may think pertinent to the general inquiry; the Commission is also to suggest a remedy to correct the evils, if they exist, and to conduct the investigation at its earliest convenience and report from time to time.¹⁰

The amending joint resolution (27 Stat. L., 443; 2 Supp. R. S., 80) of March 21, 1906, gives to the Commission the same power and authority to perform the duties required and to accomplish the purposes of the resolution, respecting the coal and oil investigation, as it has under the act to regulate commerce and amending acts. The same resolution makes applicable to the investigation the act relating to testimony before the Interstate Commerce Commission upon the subject of immunity (act Feb. 11, 1893).

In the partial report made in pursuance of this resolution, under date of January 25, 1907, the Commission recommended, as follows:

First. That every common carrier engaged in interstate transportation of coal be required to make public the system of car distribution in effect upon its railway and the several divisions thereof, showing how the equipment for coal service is divided between the several divisions of its road and how the same, in times when the supply of equipment does not equal the demand, is divided among the several mining operations along such road, and that the carrier further be required to publish at stated periods, and at each divisional headquarters upon its line of road, the system of car distribution in effect and the actual distribution made to each mining operation under such system.

Second. That where the capacity of the mines is the basis for the distribution of equipment, a fair, just, and equitable rating of the mines be required, and that provision be made for the representation of owners of the mines at the rating thereof.

⁹ This method of securing information has been frequently used by the legislature; some resolutions are joint, while others are passed by either the Senate or the House. The former confer authority while resolutions of the latter kind ask for information, which is often in the possession of the Commission, although further investigation may be necessary. Illustrations of the numerous resolutions asking for information will be found in 20th Ann. Rept., 14.

¹⁰ The first report under this resolution was House Doc. No. 561, 59th Cong., 2d session.

Third. That after reasonable time carriers engaged in interstate commerce be prohibited from using "individual" or "private cars" for the handling of coal traffic; and further, that when a carrier is unable to furnish all the cars required by all the shippers upon its line, all cars in service on the road, excepting individual or privately owned cars until their use is prohibited, be treated as the equipment of the company and subject to distribution according to the system or plan in effect at that time.

Fourth. That carriers engaged in interstate commerce be forbidden after reasonable time to own or have any interest, directly or indirectly, in any operated coal properties, except such as are exclusively for their own fuel supply, and that ownership, either directly or indirectly, by officers or employees of common carriers of any coal properties or any of the stock of coal companies along the line of road by which they are employed be forbidden.

The cases involving the distribution of cars to coal mines are:

U. S. ex rel. Coffman v. N. & W. R. Co. (109 Fed. 821); Logan Coal Co. v. P. R. (154 Fed. 497); C. & A. R. Co. v. I. C. C. in Circuit Court for northern district of Illinois, 1908; U. S. ex rel. Piteairn v. B. & O. (154 Fed. 108); R. Com. v. H. V. R. Co. (12 I. C. C. 398); Traer, rec. v. C. & A. R. Co. (13 I. C. C. 51); Royal C. & C. Co. v. S. R. Co. (13 I. C. C. 440); R. & R. C. Co. v. B. & O. (14 I. C. C. 46); U. S. ex rel. Kingwood v. W. Va. N. R. Co. (125 Fed. 252); Powhatan C. & C. Co. v. N. & W. R. Co. (13 I. C. C. 69); R. & R. C. Co. v. B. & O. (14 I. C. C. 46).

Sec. 54. Authority of Commission under act to promote the safety of employees on railroads (Ash Pan Act)—The Interstate Commerce Commission has cast upon it, under section 4 of the provisions of this act (35 Stat. L., 476), the duty of enforcing it, and the powers given by preceding acts are extended to the Commission for that purpose. The act prohibits in section 1 the use after January 1, 1910, of any locomotive not equipped with an ash pan which can be dumped and cleaned without the necessity of an employee going under the locomotive.

Sec. 55. Authority of Commission over street railways in the District of Columbia.—By section 16 of an act approved May 23, 1908 (35 Stat. L., 246), city railroads in the District of Columbia are required to supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances, and service, comfortable and convenient, and so operate the same as to give expeditious passage to all persons desirous of using the cars, without crowding. Under this act the Commission is given power to require and compel obedience to this provision and to make, alter, and amend needful rules and recommendations in this behalf and further to make such orders and regulations as it may deem reasonable and proper to the exercise of the powers given by the act. Prosecutions for violations of the act are, by section 17, to be on information of the Commission in the Police Court of the District of Columbia.¹¹

¹¹ The Commission on July 1, 1908, appointed 3 examiners, under its authority by act of May 23, 1908, to appoint special examiners to administer oaths, ex-

Sec. 56. Authority of Commission under the act to promote the safety of employees and travellers.—This act (34 Stat. L., 1415), called the “hours of labor act”, provides, in section 2, for the number of hours during which a railroad’s employees may be kept on duty. It is, in section 4, made the duty of the Commission to enforce and execute the provisions of the act, and the powers previously granted by other acts are extended to the Commission for the purpose of executing this act. It is made the duty of the Commission, in section 3, to lodge with the district attorney information of any violations of the act which may come to its knowledge.

The act further provides, in section 3, that the Commission may, after full hearing, extend the period within which a carrier shall comply with the proviso relating to telegraph operators.

Under this act the Commission has prescribed rules regarding reports from carriers concerning the hours during which employees are worked, for the purpose of detecting violations of the law.¹²

Sec. 57. Authority of Commission under act to promote the safe transportation in interstate commerce of explosives and other dangerous articles (35 Stat. L., 554).—Under the provisions of section 2 of this act the Commission has authority to formulate regulations for the safe transportation of explosives, said regulations being binding upon all common carriers engaged in interstate commerce which transport explosives by land. The Commission is authorized upon its own motion, or upon application made by an interested party, to make changes or modifications in the regulations made in this behalf. It is provided that the regulations made in pursuance of the act shall be in accord with the best known practicable means for securing safety in transit, and cover the packing, marking, loading, and handling while in transit, and precautions necessary to determine whether the material when offered is in proper condition to transport. The regulations are to take effect three months after their formation and promulgation, and to remain in effect until reversed, set aside, or modified.

There are sections prohibiting the transportation of certain explosives unless the conditions are complied with, and an offense under the act is a misdemeanor, and upon conviction one is subject to fine and imprisonment.

amine witnesses, and receive testimony, who, jointly, are to sit as a board to hear complaints against the street railway systems of the City of Washington. This board consists of Gen. John M. Wilson, U. S. Army (retired), Henry L. West, one of the Commissioners of the District of Columbia, and Thomas W. Smith, merchant. The secretary of the board is H. C. Eddy.

¹² Proceedings were recently instituted in the United States Circuit Court at Philadelphia, alleging that the orders of the Commission concerning the examination of carriers’ records, for the purpose of ascertaining violations of this act are in violation of the fourth amendment of the Constitution, relating to searches and seizures.

Under this act the Commission by an order effective July 15, 1908, provided regulations for the transportation of explosives.

Sec. 58. Duty of chairman of Commission under arbitration act (30 Stat. L., 424)—By section 2 the chairman of the Interstate Commerce Commission, with the Commissioner of Labor, upon the request of either party to a controversy concerning wages of employees of common carriers (except masters of vessels and seamen) engaged in interstate commerce is authorized to communicate with the parties to the controversy, and attempt by mediation and conciliation to amicably effect settlement; and, if mediation and conciliation be unsuccessful, endeavor to secure arbitration of the controversy. If articles of arbitration be signed a copy is to be furnished the chairman, who is to file the same in the office of the Commission. The chairman is authorized by section 6 to call together the arbitrators after agreement to arbitrate is signed, but may decline to do so unless it appears that the award can be regarded as binding upon the employees.¹³

The powers conferred by this act were not invoked for some years after its passage. Within the past two or three years, however, the chairman of the Interstate Commerce Commission and the Commissioner of Labor have been called upon to mediate in several cases.

Sec. 59. Relation of the Interstate Commerce Commission to the anti-trust law.¹⁴—Since the decision of the Supreme Court in *U. S. v. Trans-Missouri Assn.* (166 U. S., 290), by which it was held that the antitrust law¹⁵ applied to common carriers engaged in interstate commerce, a considerable number of complaints before the Commission have alleged that the rates or practices of carriers are brought into being and maintained in violation of that act. The purpose of this has apparently been to indicate that because there has been a uniformity in rates and practices the rate or practice is therefore in

¹³ *In re S. P. Co.* (155 Fed., 1001), held that the arbitration provided for by the act is essentially a common-law arbitration, and rests solely on the written agreement of the parties, which limits and determines not only the rights of the parties, but also the extent of the powers of the arbitrators; and, further, that such agreement is to be construed in accordance with the principles governing the construction of contracts, rather than those applicable to pleadings.

Sec. 10 of the arbitration act (Act of June 1, 1898) was held unconstitutional in *U. S. v. Scott* (U. S. Dist. Court, Western District of Kentucky) in that this section is not in a constitutional sense a regulation of commerce among the States, inasmuch as its essential object is to regulate certain phases of the right of an employer to choose his servants, whether the duties of them shall be in interstate commerce.

¹⁴ "An act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890 (26 Stat. L., 209).

¹⁵ This act has been recently included as one of the "commerce laws" (Rose Code of Federal Procedure). This author includes the antitrust acts of 1890 and 1894, the interstate commerce acts including the expediting act, immunity act, and Elkins' law, under the general denomination of commerce laws. Such classification seems proper in that these laws are closely descended from the commerce clause of the Constitution.

violation of the act to regulate commerce because the agreement to maintain and enforce the same is in violation of the antitrust law.¹⁶

Where a complaint alleges that the rates or practices are maintained in violation of the antitrust law the Commission has ordinarily at the hearing received evidence tending to show the violation of that act, and if the evidence has been of sufficient weight to indicate violation the Commission have referred the testimony to the Attorney-General for his action.¹⁷

In several instances it has been argued that because a rate or practice is in force and effect by reason of agreement between carriers, which agreement is alleged to be in violation of the antitrust law, therefore the rate of practice is unreasonable or unduly discriminatory. It should be observed, however, that the Commission is not charged with the enforcement¹⁸ of the antitrust law, its duties being confined to the act to regulate commerce and such other acts as confer upon it authority. The carrier, by making an agreement to maintain rates, may possibly violate the Sherman antitrust law and yet not violate the act to regulate commerce. The former prohibits all contracts in restraint of trade, whether reasonable or unreasonable; the latter is directed against rates and practices which are unjust and unreasonable. Thus an agreement to maintain a reasonable rate or proper practice may be in violation of the antitrust act, but not of the interstate commerce act. An agreement to maintain an unreasonable rate or unduly discriminatory practice may be in violation both of the antitrust act and of the act to regulate commerce.

Commission may consider whether advanced rates result from concert of action:

INSTANCE.—In *Central Y. P. Assn. v. I. C. R. Co.* (10 I. C. C., 505) it was held where an advance of rates was complained of and alleged to be the result of concerted action by the defendants and other carriers subject to the act, that, although the question of whether such concert of action is in violation of the antitrust law is for determination by the courts, it nevertheless is within the province and duty of the Commission, when the reasonableness of rates is in issue before it, to consider whether the advanced rates resulted from informal action or by the concert of action or combination of carriers. Affirmed (*Tift v. S. R. Co.* 10 I. C. C., 548).

Association in violation of antitrust law may be proper party complainant:

INSTANCE.—In *Cattle Raisers' Assn. v. Ft. W. and D. C. R. Co.* (7 I. C. C.,

¹⁶ The mere agreement to maintain a rate or practice may be in violation of the antitrust law (*Northern Securities Co. v. U. S.*, 193 U. S., 197).

¹⁷ For example, 13th Ann. Rep., p. 15 et seq.

¹⁸ In *Sprigg v. B. & O. R. Co.* (8 I. C. C., 443) it was held that the Commission has no authority to administer the antitrust law or to determine whether it has been violated, and should the investigation disclose a violation of that law the power of the Commission would not be enlarged nor its duty changed in respect to the rate involved in the inquiry.

513) it was held that a corporation whose members were engaged in the sale of commodities and certain by-laws of which and proceedings were in violation of the antitrust law (act July 2, 1890), was nevertheless entitled to be a party complainant under section 13.

In some instances the answers of defendant carriers have set up the fact that the complainant is an association existing in violation of the antitrust law, and argue therefrom that it was not a proper party within the purview of the statute; so, also, evidence has been adduced in some instances tending to show such facts. The Commission, however, broadly construing the provisions of section 13, have permitted complaining associations having by-laws which are in apparent conflict with the antitrust law to file and prosecute cases.

A rate advanced as the result of agreements between carriers is not necessarily unreasonable:

INSTANCE.—In *Enterprise Mfg. Co. v. G. R. Co.* (12 I. C. C., 451), the Commission held that a rate which is advanced as a result of an agreement among carriers, even if such agreement be with color of violation of the antitrust act, will not on that ground alone be declared unreasonable; evidence of such violation is pertinent and must be considered, but the existence of such an unlawful agreement, even when proved, is not conclusive of the unreasonableness of the rates so advanced.

The Commission has no authority to administer the antitrust law, nor to determine whether it has been violated:

INSTANCE.—In *Spriggs v. B. & O. R. Co.* (8 I. C. C., 443), the Commission held that it had no authority to administer the antitrust law, or even to determine whether it has been violated. If an investigation discloses a violation of that law, the power of the Commission is not enlarged nor its duty changed in respect of the rate involved in the inquiry. No relief can be afforded the complainants in this proceeding upon the theory that the quarterly ticket was withdrawn under an agreement between the carriers in violation of the antitrust law, even if the facts were found in support of that contention.

The Commission may not, and generally will not, pass on the question whether or not the agreement of carriers respecting rates and practices is in violation of the antitrust act:

INSTANCE.—In *China & Japan T. Co. v. Georgia R. Co.* (12 I. C. C., 236), the Commission said: The evidence of complainants tended to show that an illegal agreement to advance rates on cotton piece goods was entered into by these trans-continental lines and that the advanced rates were put in in consequence of that agreement. We do not, however, find it necessary to pass upon that question, because if it were answered in favor of the complainants we should still be of the opinion that this would afford no ground for either reducing the rate from the southern mills or awarding reparation.

We administer the act to regulate commerce alone.

In *Warren Mfg. Co. v. S. R. Co.* (12 I. C. C., 381), it was held that the violation of the so-called antitrust act by unwarranted agreements in restraint of trade by carriers of interstate commerce is not within the jurisdiction of the Commission but only the correction of unreasonable rates which may be the purpose and effect of such illegal act.

Sec. 60. Relation of the Commission to customs and immigration laws.

—In cases involving import traffic, whether in the transportation of commodities or of passengers, the Commission is frequently called upon to consider, in connection with the rates on merchandise, the custom tariffs, and in connection with the transportation of passengers the laws pertaining to immigration and the regulations made by executive authority under those laws; thus, if the rates on a commodity from domestic territory be advanced but from a foreign territory remain the same the result may be to apparently prejudice the domestic article in favor of the imported; so, also, in other cases the effect of changes in rates or changes in customs tariffs may be brought to the attention of the Commission. The Commission is not, however, charged with enforcing customs laws or assisting in the policy of the Government in the collection of customs duties, nor is it charged with interfering with the immigration regulations.

The Commission has considered advances in rates and changes in customs duties as affecting the volume of movement of a domestic product:

INSTANCE.—In *Natl. Hay Assn. v. L. S. & M. S. R. Co.* (9 I. C. C., 264) the Commission said:

“After the change [advance] in rates complained of took effect the volume of these [domestic] shipments were considerably diminished. One cause for this decrease in hay shipments to eastern points, particularly to New England and New York City destinations, is claimed by complainant to be the retention by certain of the defendants of commodity rates on hay produced in Canada while enforcing fifth class instead of sixth class rates on American hay from the Middle West. These commodity rates on the Canadian product having remained substantially the same after as they were before January 1, 1900, the increase on that date from sixth to fifth class rates on American hay did plainly give that much advantage to the foreign hay imported from Canada, and had the result also of diminishing the effect of the duty of \$4 per ton which was imposed on imported hay by the Dingley Act of 1897. The duty on such hay was increased under that act from \$2 per ton, which has been fixed by the act of 1893. Under the preceding McKinley tariff act of October, 1890, the duty was \$4 per ton. Prior to 1890 the duty was \$2 per ton. Immediately after the passage of the Dingley Act importations from Canada began to fall off, and between that time (1897) and the year 1900 they were much less than they had been in previous years, but in 1900 and 1901 the tonnage of imported hay was largely increased. * * *

“All but a few tons of this imported hay came from Canada and was consumed very largely in New England and the State of New York. The defendants attribute the increase in importations in 1900 entirely to the short crop of that year. The figures for the succeeding year end, as stated above, with June 30, and the crop gathered in the calendar year 1901 had not then begun to move. Undoubtedly a small or large crop in the United States must operate to increase or diminish the demand in New England or New York for hay from Canada. On the other hand, with sixth class rates prevailing in the United States and a duty of \$4 per ton from October, 1890 to 1893 on imported hay, the imports were small for 1891 and 1892 as compared with those in the fiscal

year ending June 30, 1890, when the \$2 duty was in force; under sixth-class rates in the United States and a hay duty of \$2 from 1893 to 1897 the imports increased gradually to large proportions in 1896; with sixth class rates and the duty of \$4 restored in 1897 the imports decreased to a minimum in 1898 and 1899; and under the advance in rates on American hay from sixth to fifth class on January 1, 1900, the imports became larger in 1900 and 1901 than in any previous year above given except 1895 and 1896, when the \$2 duty was in force."

The interstate commerce act can not be construed to make it co-operative with tariff laws:

INSTANCE.—In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197) the Supreme Court said:

"Another position taken by the Commission in its report and defended in the briefs of counsel is that it is the duty of the Commission to so construe the act to regulate commerce as to make it practically cooperate with what is assumed to be the policy of the tariff laws. This view is thus stated in the report:

"One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent, from the evidence in this case, that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities for supplying the wants of American consumers at interior places in the United States, and that under domestic bills of lading they seek to require from American carriers like service as their foreign competitors in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute.' (New York *Bd. of Trade & T. v. P. R. Co.*, 4 I. C. C. Rept., 514).

"Our reading of the act does not disclose any purpose or intention, on the part of the Congress, to thereby reinforce the provisions of the tariff laws. These laws differ wholly in their objects from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the Government, and those of their provisions whereby the Congress seeks to so adjust rates as to protect American manufacturers and producers from competition by foreign low-priced labor, operate equally in all parts of the country," and in the dissenting opinion by Harlan, J., it was said respecting the relative rates on import and domestic traffic that the question before the court is not 'controlled by considerations arising out of tariff enactments of the Congress.' "

Commission has no authority to interfere with immigration regulations:

INSTANCE.—In *Savery v. N. Y. & H. R. R. Co.* (2 I. C. C., 338) it was held that where the reception of immigration at the port of New York had been put by State statute under the control of a board of commissioners and the board had made regulations for the protection of immigrants until they were entrained for their respective ultimate destinations and the Federal Government had sanctioned such control by the commissioners of immigration, the Commission had no authority to interfere with such regulations.

CHAPTER V

INTERPRETATION AND CONSTRUCTION OF THE ACT TO REGULATE COMMERCE

Sec. 61. General rule of construction of the act to regulate commerce.

—In interpreting and construing the act to regulate commerce the usual rules for the construction of statutes apply;¹ parts of the statute being in derogation and parts being in affirmation of the common law, the rules for interpretation and construction applicable to the two classes of statute law may in specific instances be followed.²

Statute must be broadly construed:

INSTANCE.—In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197) the Supreme Court had occasion to construe several sections of the act and prescribe a broad rule of construction as follows:

“Even in construing the terms of a statute, courts must take notice of the history of legislation, and out of different possible constructions select and apply the one that best comports with the genius of our institutions and is therefore most likely to have been the construction intended by the law-making power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to the Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation, or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.”

Sec. 62. Construction of the act to regulate commerce by the courts.—

The statute is to be broadly³ construed, as a whole,⁴ in the public in-

¹ An excellent exposition of the construction of Federal statutes will be found in *Federal Statutes Annotated*, vol. 1, “Preliminary Article on Statutes and Statutory Construction” by Charles C. Moore.

² *U. S. v. Hanley* (71 Fed., 672); *Tift v. S. R. Co.*, (123 Fed., 789).

³ *I. C. C. v. E. T. V. & G. R. Co.* (85 Fed., 107).

⁴ *Van Patten v. C. M. & St. P. R. Co.* (81 Fed., 547): “The intent of the Congress is to be gathered from a consideration of the entire act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to-wit, that, in determining the meaning of words employed, the general purpose of the act and the evils sought to be remedied must always be kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose.”

terests,⁸ to facilitate commerce,⁹ and in the light of the construction of the English statutes,⁷ on which it is largely modeled. The act was not passed for the benefit of carriers;⁸ and if relief is sought by a carrier the act will be interpreted against the carrier,⁹ but not to take away common law rights to a greater degree than the language and purposes of the act require.¹⁰

Carriers are free to manage their business, subject to the prohibitions in the statute:

INSTANCE.—In *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184) it was said that, subject to the two prohibitions that charges shall not be unjust or unreasonable, and that there should not be unjust discrimination between persons or traffic similarly circumstanced, the act leaves common carriers free, as at common law, to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet all the necessities of commerce, and generally to manage their interests upon the same principles which are adopted in other trades and pursuits.

Sec. 63. Rules of construction provided in the acts to regulate commerce.—The present acts to regulate commerce contain certain rules of construction applicable thereto. It is provided—

(a) Under section 1, that the language shall not be construed to prevent exchange of authorized passes;

(b) Under section 3, that a common carrier shall not be required to give the use of tracks or terminal facilities to another carrier in like business;

(c) Under section 4, that a carrier shall not be authorized to charge as great compensation for shorter as for longer haul;

(d) Under the provisions of section 20, not to deprive a holder of the receipt of a bill of lading of any remedy which he now may have under existing law;

⁸ *I. C. C. v. L. & N. R. Co.* (73 Fed., 409), *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), *Reagan v. Farmers' L. & T. Co.* (154 U. S., 412).

⁹ *T. & P. R. Co. v. I. C. C.* (162 U. S., 197).

In *I. C. C. v. B. & O. R. Co.* (43 Fed., 37), it was held that the construction given to the English acts by English courts when accepted must be received as if incorporated into the act.

⁷ *I. C. C. v. B. & O. R. Co.* (145 U. S., 263), *McDonald v. Hovey* (110 U. S., 619), *I. C. C. v. A. M. R. Co.* (168 U. S., 144), *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), *D. G. H. & M. R. Co. v. I. C. C.* (74 Fed., 803), *G. C. & S. F. R. Co. v. Maimi S. S. Co.* (86 Fed., 407), *I. C. C. v. L. & N. R. Co.* (73 Fed., 409). The difference between commerce in England and this country and in the respective statutes must be considered (*D. G. H. & M. R. Co. v. I. C. C.*, 74 Fed., 803; *Lindquist v. G. T. R. Co.*, 121 Fed., 918).

The courts may recur to the history of the times when an act was passed to ascertain the reasons for, and the meaning of, particular provisions but the views of individual members of the legislature cannot be considered (*U. S. v. U. P. R. Co.*, 91 U. S., 72). The Commission, however, gives great weight to the statements of legislators (*Lykes S. S. Co. v. Commercial Union*, 13 I. C. C., 310).

⁸ *K. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 567).

⁹ *L. R. & M. R. Co. v. St. L. I. M. & S. R. Co.* (63 Fed., 775), *K. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 61).

¹⁰ *I. C. C. v. L. & N. R. Co.* (73 Fed., 409), *C. & N. W. R. Co. v. Osborne* (52 Fed., 914).

(e) Under the provisions of section 22, that nothing is to prevent the carriage, storage, or handling of property at free or at reduced rates for specified classes, nor to prevent free carriage of certain designated persons, nor to prevent reduced rates to certain designated classes, nor to prevent issuance of mileage excursions or commutation tickets, nor to prevent the giving of free carriage to officers and employees, nor to prevent exchange of passes or tickets with other railroad companies, nor to abridge or alter existing remedies now (Feb. 8, 1895) existing at common law or by statute, nor to affect pending litigation, nor to prevent issuance of joint interchangeable 5,000-mile tickets;

(f) Under the provisions of section 23 that the right to mandamus shall not exclude other remedies provided for;

(g) 1. That immunity shall only extend to the natural person; act defining right of immunity to witness, etc., approved June 30, 1906;

2. That the act, omission, failure of any person, or any officer, agent, or other person acting for or employed by any common carrier or a shipper acting within the scope of his employment shall, under the provisions of section 1 of the Elkins' law be deemed the act, omission, or failure of such carrier or shipper, as well as of the individual;

3. That the rates filed and published shall, as against the carrier, its officers or agents, in any prosecution beginning under the Elkins' law, be conclusively deemed to be the legal rate (Elkins' law, sec. 1);

4. That any departure from a filed and published rate or any offer to depart therefrom shall, under the provisions of section 1 of the Elkins' law, be deemed an offense under such section.

Sec. 64. Interpretation of the act to regulate commerce by the Commission.—The Commission, early in its history, expressed its views concerning the proper interpretation of the act. It being urged that the statute is a penal statute and that the strict rules of construction should be applied, the Commission said:

While this statute contains certain provisions for penalties, in the execution of which the courts will, no doubt, follow the recognized canons of construction, nevertheless the statute as a whole should be regarded as highly remedial in its purpose and scope. It was clearly designed to secure to the public equal and impartial rights and privileges and to put an end to ancient and well-known abuses in the services rendered by common carriers. Such a statute should be construed liberally, fairly, of course, but always with the object in view of reaching as closely as possible the end proposed by the legislative intention and making the beneficial result desired operative to its greatest available extent.¹¹

In its sixth annual report (1892) the Commission speaking of the interpretation of the statute by the courts said:

It is not too much to say that judicial interpretation has limited its scope and ascribed to it an intent not contemplated when it was passed. If its supposed meaning, as understood at the time of its passage, had been upheld by the

¹¹ In re Express Companies (1 I. C. C., 349).

courts, it is believed that its operation would have been much more effective and its usefulness greatly increased. So far as failure has attended the efforts to give it proper administration, that failure can be mainly attributed to differences between its apparent meaning and the judicial interpretation which some of its provisions have received (pp. 5, 6).

Sec. 65. Construction of the act to regulate commerce by the Commission.—It can safely be said that in interpreting and construing the several provisions the Commission has been guided by the purposes and intent of the law, as well as by its phraseology. That the object of the statute was to cure certain alleged evils of railway transportation and to afford a remedy to shippers to bring about that result have been the premises for a broad and liberal construction of the law. This is true not only as to the rights created but also as to the remedies provided. Not infrequently the Commission considers the reports of committees of the Congress, the statements of legislators,¹² and, in general, gives greater weight to these than do the courts in similar instances. The decisions of the English courts will, in appropriate cases, be considered and respected by the Commission.¹³

The cases in which the Commission has construed the several provisions of the act, arranged by sections, will be found in the succeeding section.

The statute is to be read in the light of the purposes for which it was enacted:

INSTANCE.—In *re C. St. P. & K. C. R. Co.* (2 I. C. C., 231) the Commission said: "Every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history nothing can be more notorious than that the act to regulate commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for their service, should have the benefits which the law had undertaken to give, but of which in very many cases it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other. The act does, indeed, require them to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct or by favoritism, or be subjected to extortion. It is to this end that the act declares that all charges made by the

¹² For example, see *Lykes S. S. Co. v. Commercial Union* (13 I. C. C., 310) and *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266).

¹³ *Traer, receiver v. C. B. & Q. R. Co.* (14 I. C. C., 165), *Calif. Com. Assn. v. Wells Fargo & Co.* (14 I. C. C., 422), *L. R. & M. R. Co. v. E. T. V. & G. R. Co.* (3 I. C. C., 1), *R. R. Com. v. Clyde S. S. Co.* (5 I. C. C., 324).

carriers it regulates shall be reasonable and just, and the purpose of the declaration is to establish the rule that the charges shall not be extortionate."

In *Farrar v. E. T. V. & G. R. Co.* (1 I. C. C., 480) the Commission, after stating that in the transportation of freight by railroads, while the aggregate charge is continually increasing the farther the freight is carried, the rate per ton per mile is constantly growing less all the time, has become axiomatic, said: "The act to regulate commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the services performed, upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business."

Since the last amendment to the act the Commission has been called upon to construe the word "practices" as used in section 15 of the act, by which section the Commission is given jurisdiction upon complaint and a finding "that any practice whatsoever of such carrier or carriers affecting such rates are unjust or unreasonable, etc. * * * to determine and prescribe * * * what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed" and it has been held that the term "practices" in this connection must receive the broadest interpretation on account of the purposes of the statute.¹⁴

The term "practices" is to receive a broad interpretation:

INSTANCE.—In *Rail and River Coal Co. v. B. & O. R. Co.* (14 I. C. C., 86) where it was contended that the distribution of coal cars among various mines on a carrier's line were not regulations or practices "affecting rates," the Commission said: "The question is one of very large importance. If the numerous and various regulations and practices of carriers which enter so vitally into questions of transportation do not 'affect rates,' in the sense attributed by counsel for the defendant to that phrase, and therefore lie outside the jurisdiction of the Commission, our power to protect the shipping public against abuses is much less extensive than has generally been understood. There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or practice that denies to them the equal enjoyment of its facilities and if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. By giving to one manufacturer a larger proportion of cars than he is entitled to, when the volume of his traffic is compared with that of a competitor, his business may be encouraged and built up while the business of the competitor may be destroyed, if the Commission has no authority to intervene on his behalf. That there is need of such authority will appear from an examination of the published reports of proceedings in which the Commission has found just occasion to exercise it.

"The power upon complaint made to deal with unjust, preferential, and

¹⁴ *Rail and R. Coal Co. v. B. & O. R. Co.* (14 I. C. C., 86). The term coupled with "regulations" has been held to cover the distribution of cars to a coal line (*Rail and R. Co. v. B. & O. R. Co.*, 14 I. C. C., 86); and also rules and regulations prescribing who shall load and unload cars (*Wholesale F. and P. Association v. A. T. & S. F. R. Co.*, 14 I. C. C., 410).

discriminatory regulations and practices of carriers was clearly vested in the Commission under section 15 of the act as it stood prior to the amendatory act of June 29, 1906. Whether or not it still exists under section 15 of the amended act must be ascertained by examining the whole act as it now stands with a view to gathering the general intent and purpose of the enactment, and then by examining the various provisions by which the intent and purpose are sought to be made effective. The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers. That principle appears throughout the act, but nowhere more clearly than in sections 2 and 3. The former assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter assures to them an equality in the opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity to use the facilities of carriers would fall short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. And when we approach the consideration of any special provision in the act, this understanding of its general scope and purpose must not be lost sight of. As was said by Chief Justice Marshall in *The Durose v. U. S.* (6 Cranch, 307): 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.'

"But, while keeping in mind the general intent and spirit of the act, we are by no means to be understood as indicating that our power to deal with undue preferences and unlawful discriminations, when accomplished by carriers through unjust regulations and practices, rests upon implication; or that it is necessary by implication to inject into section 15 explanatory words that are not embraced within its text. The language of that provision is entirely sufficient in itself to enable the Commission to redress wrongs of the character complained of in this proceeding. In reaching this conclusion we are not required to resort to ingenuity in construction or to rest the argument upon a mere matter of punctuation as suggested by counsel. In our view any practice or regulation that unlawfully discriminates against one shipper and affords an undue preference to another shipper is a regulation or practice affecting rates within the meaning of that phrase as used in the clause in question. Any regulation or practice that withdraws from a shipper the equal opportunity of using and taking advantage of the rates offered by a carrier to the public is clearly a regulation or practice affecting rates in the sense in which that phrase is used in the amended act at the point in question. To hold otherwise, as the defendant urges, would be to put the narrowest possible construction upon those words, in disregard of the general objects and purposes of the enactment. And this we are not warranted in doing under any recognized rule of statutory construction, and more especially when a remedial statute is under consideration."

The substance and not the form to be considered:

INSTANCE.—In *Eichenberg v. S. P. Co.* (14 I. C. C., 250) it was said: "The Commission is not concluded by the form but looks to the substance of the relations between corporations engaged in interstate commerce."

Sec. 66. Construction of particular sections by the Commission.—In the course of the decisions of the Commission it has naturally been

called upon to construe and apply the various sections and parts thereof of the statute; the list of cases, arranged by sections and subjects, is as follows:

Construction of Section 1

REASONABLE RATES

- Martin v. C. B. & Q. R. Co. (2 I. C. C., 25).
 Business Men's Assn. of Minn. v. C. St. P. M. & O. R. Co. (2 I. C. C., 52).
 Business Men's Assn. of Minn. v. C. & N. W. R. Co. (2 I. C. C., 73).
 Hurlburt v. L. S. & M. S. R. Co. (2 I. C. C., 122).
 Hurlburt v. P. R. Co. (2 I. C. C., 130).
 Parkhurst & Co. v. P. Co. (2 I. C. C., 131).
 Nicolai v. P. R. Co. (2 I. C. C., 131).
 Lincoln Board Trade v. B. & M. R. Co. in Neb. (2 I. C. C., 147).
 Re C. St. P. & K. C. R. Co. (2 I. C. C., 231).
 Howell v. N. Y. L. E. & W. R. Co. (2 I. C. C., 272).
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 Davis v. P. M. R. Co. (10 I. C. C., 405).
 Paxton Tie Co. v. D. S. R. Co. (10 I. C. C., 422).
 Re Transportation of Coal & Mine Supplies (10 I. C. C., 473).
 Wylie v. N. P. R. Co. (11 I. C. C., 145).

Construction of Section 7

CONTINUOUS CARRIAGE OF FREIGHTS

- Ky. & Ind. B. Co. v. L. & N. R. Co. (2 I. C. C., 162).
 Re Acts and Doings of G. T. R. Co. (3 I. C. C., 89).
 C. R. I. & P. R. Co. v. C. & A. R. Co. (3 I. C. C., 450).
 Boston F. & P. Ex. v. N. Y. & N. E. R. Co. (4 I. C. C., 664).
 Troy Board Trade v. A. M. R. Co. (6 I. C. C., 1).
 R. Com. of Ky. v. L. & N. R. Co. (10 I. C. C., 173).
 Hope Cotton Oil Co. v. T. & P. R. Co. (10 I. C. C., 696).

Construction of Section 8

- Councill v. W. & A. R. Co. (1 I. C. C., 339).

Macloon v. C. & N. W. R. Co. (5 I. C. C., 84).
 Freight Bureau v. C. N. O. & T. P. R. Co. (6 I. C. C., 195).
 Indpt. Refiners' Assn. v. W. N. Y. & P. R. Co. (6 I. C. C., 378).
 Cattle Raisers' Assn. v. C. B. & Q. R. Co. (10 I. C. C., 83).
 Davis v. P. M. R. Co. (10 I. C. C., 405).

Construction of Section 9

Bishop v. Duval, receiver (3 I. C. C., 128).
 Harris v. Duval, receiver (3 I. C. C., 128).
 Macloon v. C. & N. W. R. Co. (5 I. C. C., 84).
 Gallogly & Firestone v. C. H. & D. R. Co. (11 I. C. C., 1).

Construction of Sections 12, 13, 14, and 15

1st Ann. Rept. I. C. C., 295.
 Councill v. W. & A. R. Co. (1 I. C. C., 339).
 Heck & Petree v. E. T. V. & G. R. Co. (1 I. C. C., 495).
 Riddle, Dean & Co. v. N. Y. L. E. & W. R. Co. (1 I. C. C., 594).
 2d Ann. Rept. I. C. C., 408.
 Re Tariffs and Classifications of A. & W. P. R. Co. (3 I. C. C., 19).
 Re Acts and Doings of G. T. R. Co. (3 I. C. C., 89).
 Sanger v. S. P. R. Co. (3 I. C. C., 134).
 Rice v. C. W. & B. R. Co. (3 I. C. C., 186).
 Rice v. L. & N. R. Co. (3 I. C. C., 186).
 Rawson v. Newport News & Miss. Valley Co. (3 I. C. C., 266).
 White v. M. C. R. Co. (3 I. C. C., 281).
 3d Ann. Rept. I. C. C., 292, 432.
 Re Alleged Excessive Freight Rates and Charges on Food Products (4 I. C. C., 62).
 McMillan & Co. v. Western Classification Committee (4 I. C. C., 276).
 Bates v. P. R. Co. (4 I. C. C., 281).
 Haddock v. D. L. & W. R. Co. (4 I. C. C., 296).
 4th Ann. Rept. I. C. C., 337.
 Cox Bros. & Co. v. L. V. R. Co. (4 I. C. C., 535).
 Boston F. & P. Ex. v. N. Y. & N. E. R. Co. (4 I. C. C., 664).
 R. Com. of Fla. v. S. F. & W. R. Co. (5 I. C. C., 13).
 Perry v. F. C. & P. R. Co. (5 I. C. C., 97).
 Rising v. S. F. & W. R. Co. (5 I. C. C., 120).
 Macloon v. C. & N. W. R. Co. (5 I. C. C., 84).
 R. Com. of Ga. v. Clyde S. S. Co. (5 I. C. C., 324).
 R. Com. of Ga. v. Ocean S. S. Co. (5 I. C. C., 324).
 R. Com. of Ga. v. C. N. O. & T. P. R. Co. (5 I. C. C., 324).
 R. Com. of Ga. v. W. & A. R. Co. (5 I. C. C., 324).
 R. Com. of Ga. v. S. C. R. Co. (5 I. C. C., 324).
 R. Com. of Ga. v. L. & N. R. Co. (5 I. C. C., 324).
 James & Abbot v. C. P. R. Co. (5 I. C. C., 612).
 Tecumseh Celery Co. v. C. J. & M. R. Co. (5 I. C. C., 663).
 Cattle Raisers' Assn. v. F. W. & D. C. R. Co. (7 I. C. C., 513).
 Chicago Live S. Ex. v. C. G. W. R. Co. (10 I. C. C., 428).

Construction of Section 15 (new).

Cattle Raisers' Assn. v. M. K. & T. R. Co. (12 I. C. C. 1).
 Rail & R. Coal Co. v. B. & O. R. Co. (14 I. C. C., 86).
 Romona Oolithic Stone Co. v. V. R. Co. (13 I. C. C., 115).

Construction of Section 16

Re Alleged Excessive Freight Rates and Charges on Food Products (4 I. C. C., 116).

Indpt. Refiners' Assn. v. P. R. Co. (6 I. C. C., 449).

Construction of Section 17

San Bernardino Board Trade v. A. T. & S. F. R. Co. (4 I. C. C., 104).

Re Investigation of Alleged Excessive Freight Rates and Charges on Food Products (4 I. C. C., 116).

Poughkeepsie Iron Co. v. N. Y. C. & H. R. R. Co. (4 I. C. C., 195).

Rice v. A. T. & S. F. R. Co. (4 I. C. C., 228).

King & Co. v. N. Y. N. H. & H. R. Co. (4 I. C. C., 251).

Capehart v. L. & N. R. Co. (4 I. C. C., 265).

McMillan & Co. v. Western Classification Committee (4 I. C. C., 276).

Bates v. P. R. Co. (4 I. C. C., 281).

Haddock v. D. L. & W. R. Co. (4 I. C. C., 296).

Proctor & Gamble v. C. H. & D. R. Co. (4 I. C. C., 443).

N. Y. Board Trade & Transportation v. P. R. Co. (4 I. C. C., 447).

Delaware State Grange, etc v. N. Y. P. & N. R. Co. (4 I. C. C., 588).

Boston F. & P. Ex. v. N. Y. & N. E. R. Co. (4 I. C. C., 664).

Hamilton & Brown v. C. R. & C. R. Co. (4 I. C. C., 686).

N. O. Cotton Ex. v. L. N. O. & T. R. Co. (4 I. C. C., 694).

Toledo Produce Ex. v. L. S. & M. S. R. Co. (5 I. C. C., 166).

Kemble v. L. S. & M. S. R. Co. (5 I. C. C., 166).

R. Com. of Ga. v. Clyde S. S. Co. (5 I. C. C., 324).

R. Com. of Ga. v. Ocean S. S. Co. (5 I. C. C., 324).

R. Com. of Ga. v. C. N. O. & T. P. R. Co. (5 I. C. C., 324).

R. Com. of Ga. v. G. & W. A. R. Co. (5 I. C. C., 324).

R. Com. of Ga. v. S. C. R. Co. (5 I. C. C., 324).

R. Com. of Ga. v. L. & N. R. Co. (5 I. C. C., 324).

Rice v. St. L. S. W. R. Co. (5 I. C. C., 660).

Tecumseh Celery Co. v. C. J. & M. R. Co. (5 I. C. C., 663).

Construction of Section 20

1st Ann. Rept. I. C. C., 301.

2d Ann. Rept. I. C. C., 490.

Construction of Section 22

Re Indian Supplies (1 I. C. C., 15).

Re U. S. Commission of Fish & Fisheries (1 I. C. C., 21).

Re Disabled Soldiers and Sailors (1 I. C. C., 28).

Larrison v. C. & G. T. R. Co. (1 I. C. C., 147).

M. C. R. Co. v. C. & G. T. R. Co. (1 I. C. C., 147).

Associated Wholesale Grocers of St. Louis v. M. P. R. Co. (1 I. C. C., 156).

Griffie v. B. & M. R. R. Co. (2 I. C. C., 301).

Re Passenger Tariffs (2 I. C. C., 649).

Rawson v. N. N. & M. V. Co. (3 I. C. C., 266).

3d Ann. Rept. I. C. C., 302, 433.

P. C. & St. L. R. Co. v. B. & O. R. Co. (3 I. C. C., 465).

Matter of Carriage of Persons Free or at Reduced Rates by B. & M. R. Co. (5 I. C. C., 69).

Harvey v. L. N. R. Co. (5 I. C. C., 153).

Cator v. S. P. R. Co. (6 I. C. C., 113).

Sprigg v. B. & O. R. Co. (8 I. C. C., 443).

Sec. 67. The subjects contained in the administrative rulings and opinions.—Since the passage of the act of June 29, 1906, the Commission has from time to time made various administrative rulings, most of which relate to the construction, application and interpretation of the law; these rulings are to be found in Tariff Circular No. 15-A, effective April 15, 1908, No. 16-A, effective August 1, 1908, and in the conference rulings of the Commission, Bulletin No. 1, issued May 7, 1908, and Bulletin No. 2, issued July 9, 1908. Additional rulings are promulgated from time to time.¹⁵

The subjects concerning which the Interstate Commerce Commission have made administrative rulings and opinions are:

[Tariff Circular 15-A, effective April 15, 1908.]

52. Round-trip excursion fares.
53. Round-trip tickets on certificate plan.
54. Changes in rates or fares.
55. Joint rate of fare greater or less than sum of locals.
56. Reduction of joint rate or fare to equal sum of locals.
57. New roads.
58. Requests for permission to amend tariffs on less than statutory notice.
59. Division of joint rates or fares. Contracts and agreements for, must be filed.
60. Diverting traffic because of blockades.
61. Equalizing rules or tariffs.
62. Free transportation of passengers in connection with shipment of property.
63. Free passes and free transportation.
64. Transportation of men or property for telegraph companies.
65. Transportation of newspaper employees on special newspaper trains.
66. Free transportation of officers or employees of omnibus or baggage express companies.
67. Payment for transportation.
68. Party-fare tickets.
69. Transportation of circus outfits.
70. Routing and misrouting freight.
71. Maximum rates and fares not specific rates and fares.
72. Combination of joint rate or fare to common points and local rate or fare beyond.
73. Carriers may not be given preferential rates.
74. Return of astray shipments.
75. Transportation of Federal troops.
76. Classification of high explosives.
77. Minimum carloads.
78. Movement of shipments refused by consignees or damaged in transit.
79. Correspondence with Commission on freight and passenger matters.
80. Distribution of official circulars and rulings.
81. Special reparation on informal complaints.
82. Refunds and commissions.
83. Responsibilities of carriers under tariffs.
84. Extensions of time on limited tickets.

¹⁵ For the reasons assigned by the Commission for making administrative rulings, see sec. 13, *ante*.

- 85. Withdrawal of filed tariffs not permitted.
- 86. Ocean carriers—Export and import tariffs.

RULINGS AND OPINIONS APPLICABLE TO EXPRESS COMPANIES

[Tariff Circular No. 16-A, effective August 1, 1908.]

- 26. Changes in rates.
- 27. Joint rate greater or less than sum of locals.
- 28. Reduction of joint rate to equal sum of locals.
- 29. New offices.
- 30. Rates on carload shipments between points as to which no carload rates are in effect.
- 31. Requests for permission to amend tariffs on less than statutory notice.
- 32. Division of joint rates. Contracts and agreements for, must be filed.
- 33. Diverting traffic because of blockades.
- 34. Free transportation of passengers in connection with shipments of property.
- 35. Transportation for Government.
- 36. Payment for transportation.
- 37. Routing and misrouting.
- 38. Maximum rates not specific rates.
- 39. Carriers may not be given preferential rates.
- 40. Return of astray shipments.
- 41. Movement of shipments refused by consignees or damaged in transit.

CONFERENCE RULINGS OF THE COMMISSION

[Bulletin No. 1, issued May 7, 1908.]

- 1. Passes to caretakers.
- 2. Tariffs distinguishing between shipments handled by steam and electrical power.
- 3. Collection of undercharges.
- 4. Rates on new lines.
- 5. Free storage creating distributing point for private industry.
- 6. Reconsignment rule will not be given retroactive effect.
- 7. Commissions on import traffic.
- 8. Demurrage charges resulting from strikes.
- 9. Free transportation by carriers for one another.
- 10. Statute of limitations.
- 11. Reduction of rate when formal complaint against it is pending.
- 12. Tariff that fails to state the date of its effectiveness is unlawful.
- 13. Tariffs not concurred in are unlawful.
- 14. Maintenance of rate reduced after complaint filed.
- 15. Delivering carrier must investigate before paying claims.
- 16. Delivering carrier must collect undercharges.
- 17. Feeding and grazing in transit.
- 18. Free transportation of dead body of employee.
- 19. Expense incurred in preparing cars for shipments can not be paid by carrier in the absence of tariff provision therefor.
- 20. Special understandings between shippers and carriers, not published in their tariffs, of no valid effect.
- 21. Caretakers of milk.
- 22. Free carriage of company material.

23. Extension of time on through passenger tickets.
 24. Canadian rates.
 25. Refund of drayage charges caused by misrouting.
 26. Use of intrastate commutation ticket in interstate journey.
 27. Excursion ticket invalidated through failure of carrier to make connection.
 28. Tickets for transportation and meals, hotel accommodations, etc.
 29. Quotations from correspondence of the Commission.
 30. Carriers' monthly reports to be furnished in duplicate.
 31. Demurrage charges on astray shipments.
 32. Demurrage charges.
 33. Reduced transportation for Federal, State, and municipal governments.
 34. Coal used for steam purposes not entitled to reduced rates.
 35. Use of State passes in interstate journeys unlawful.
 36. Rates on shipments for the Federal Government.
 37. Passes to caretakers.
 38. Reparation on informal complaints.
 39. Accrued demurrage charges.
 40. Printing of briefs.
 41. Division of proceeds of sale of shipment to pay freight charges.
 42. Rates on return movements.
 43. Extension of time on through passenger tickets.
 44. Limitations of passenger tickets.
 45. Passengers on freight trains.
 46. Reparation on informal pleadings—Passenger tickets.
 47. Tariff taking effect on Sunday.
 48. May a shipper offset a claim against a carrier by deducting from freight charges on shipment?
 49. Benefit of reparation orders extends to all like shipments.
 50. When joint agent publishes a new rate between two points without canceling the old rate duly published by one of the carriers, the old rate on that line remains in effect.
 51. The use of Pullman cars at stop-over points can not be limited to members of a particular club.
 52. Rate eastbound can not be applied westbound unless so published.
 53. Transit privilege not availed of can not be renewed after the expiration of the time allowed in the tariffs.
 54. Demurrage on interstate shipments.
 55. Free pass to railway employee on leave of absence.
 56. Hours of service law—Street-car companies.
 57. Reshipping rate from primary grain markets.
 58. Declaring a false valuation in violation of section 10.
 59. Carriers must send car through or transfer shipment en route.
 60. No refund to passenger who exceeded stopover limit.
 61. Storage charges on trunk accruing because of injury to passenger.
- [Bulletin No. 2, issued July 9, 1908.]
62. Boats that are not common carriers.
 63. Servants may not use free passes.
 64. Absorption of switching charges.
 65. Special rates for United States, State, or municipal governments.
 66. Joint rates between a water and a rail carrier subjects the former to the provisions of the act.
 67. Handholds—Safety-appliance law.
 68. Adjustment of claims.

69. Error by ticket agent.
70. Effect of a failure in a new tariff naming higher rates to cancel the same rates in prior tariff.
71. Different fares to different societies unlawful.
72. Reconsignment privileges and rules.
73. Effective date of tariff filed by a carrier when first coming under the law.
74. Hours-of-service law.
75. Validation of tickets.
76. Redemption of passenger tickets.
77. Transit privileges not retroactive.
78. Grain doors.
79. "Private side tracks" and "private cars" defined.
80. Shipment that moved in under a former tariff does not lose the benefit of transit privilege canceled pending the out movement.
81. Supplementing mileage books by paying regular local mileage rates.
82. Chartering trains.
83. Blockade by flood.
84. A commodity rate takes the commodity out of the classification.
85. Substituting tonnage at transit point.
86. Posting tariffs at stations.
87. Transportation for eating houses operated by or for carriers.
88. Hours-of-service law.
89. In the matter of the use of tariffs containing long and short haul clauses, maxima rules, and alternative rate of fare provisions.
90. Jurisdiction of act over local belt or switching lines.
91. Misrouting via line that has no tariff on file.
92. A much longer and more indirect route not a reasonable route.
93. Use of passes by servants.
94. Misrouting involving carriers not subject to the act.
95. Leasing carrier's property in consideration of lessee's shipments.
96. Notice as to the issuance of passes.

SUPPLEMENTAL ADMINISTRATIVE RULINGS AND OPINIONS

Boats that are not common carriers.

Servants may not use free passes.

Absorption of switching charges.

Special rates for United States, State, or municipal governments.

Joint rates between a water and a rail carrier subjects the former to the provisions of the act.

Handholds—Safety-appliance law.

Adjustment of claims.

Error by ticket agent.

Effect of a failure in a new tariff naming higher rates to cancel the same rates in prior tariff.

Different fares to different societies unlawful.

Reconsignment privileges and rules.

Effective date of tariff filed by a carrier when first coming under the law.

Hours-of-service law.

Validation of tickets.

Redemption of passenger tickets.

Transit privileges not retroactive.

Grain doors.

"Private side tracks" and "private cars" defined.

Shipment that moved in under a former tariff does not lose the benefit of transit privilege canceled pending the out movement.

Supplementing mileage books by paying regular local mileage rates.

Chartering trains.

Blockade by flood.

A commodity rate takes the commodity out of the classification.

Notice as to the issuance of passes.

These rulings and opinions are added to from time to time as occasion arises.

In any case involving the rights of parties or the interpretation and construction of the act to regulate commerce a knowledge of the ruling and opinion applying is important. Not infrequently, particularly in reparation cases, formal or informal, the precise point has been the subject of a decision of the Commission. As the administrative rulings and opinions are added to from time to time, one needs to be advised of all the rulings in order to be thoroughly informed.

What weight is to be given to an administrative ruling and opinion, in the absence of other authority, is difficult to say. Certain it is, such an opinion is the decision of the Commission and is authority until it has been overruled; and it is equally certain that when the prior proceedings, which have produced an opinion of this nature, be considered such opinion ought not have the weight of one rendered after formal complaint and investigation. Many, if not all, administrative rulings and opinions have resulted from inquiries from shippers and carriers respecting the position of the Commission or its advice in a specific matter; ordinarily there has been no investigation, no lengthy presentation of facts, and no argument upon the legal principles involved. It should not be inferred, however, from what has been said, that these opinions have been made hastily or without due consideration; the contrary is the fact. They deal with and apply to general cases and can not be said to have the weight of an opinion in a formal proceeding.

Where an administrative ruling and opinion decides the matters involved in a prospective complaint one must have such facts, or there must be such equities as to take the case of the general rule. One must, in other words, be prepared to so present the case as to show that it is without the class of cases covered by the administrative opinion.

It may be that some of the administrative rulings and opinions are not warranted by the act to regulate commerce or by general law. Should one desire to attack directly a ruling which he considers to be erroneous as a matter of law he must be able to convince the Commission thereof.

CHAPTER VI

PLEADING AND PRACTICE BEFORE THE COMMISSION

Sec. 68. Election of forum.—One claiming to be damaged by reason of a violation of the act to regulate commerce by a carrier is, by section 9 thereof, given the election to proceed before the Commission or in the circuit or district courts of the United States. Several sections of the act impose obligations on the carriers cognizable by either of the forums, but section 8 specifically creates the liability of the carrier and section 9 expressly affords the remedy.

One can not, however, proceed in both forums and an election is final.

There are reasons in some instances for choosing the Commission; in others the courts are preferable. Each case must be considered separately. In the courts one will be required to conform to the strict rules of pleading and evidence; before the Commission the procedure is less formal. In the courts a jury trial may work disadvantageously. The expert traffic knowledge of the Commission respecting transportation is of value in all cases. A suit before the court might abate when the liberal practice of the Commission respecting substitution or addition of parties by amendment would cause no injury. The nature and extent of the remedy which each of the forums can give is important; in an appropriate case the court could grant an injunction while the Commission has no such authority.

Prior to the passage of the rate law of 1906 (act of June 29, 1906, 34 Stat. L., 584) there was no provision in the law respecting limitations and the Federal courts followed the State statutes in this behalf; under the present section 16 complaints to the Commission for damages must be filed within two years from the time the cause of action accrued. It seems probable that this limitation is not binding on the courts of the United States and that in those forums the rule formerly in use still applies. The court is authorized to fix a reasonable counsel fee in the event of recovery by the plaintiff; the Commission does not award any fees. To give the courts jurisdiction it is probable (see sec. 30, *ante*), that the amount involved must be \$2,000. The Commission is not limited as to the amount in controversy.

Court costs fall on one of the parties; before the Commission no costs are assessed. While the courts liberally construe the act, the

Commission is inclined to be more liberal than the judicial bodies. The usual time in which to secure a determination of a matter before the Commission is less than in the courts,¹ owing to the time within which the defendant must reply, the lack of delay arising from subsequent pleadings or demurrer and the prompt taking of testimony by the examiners or the Commission.

In cases seeking damages one needs to consider whether or not, damages being awarded by the Commission, the carrier would obey the order, for if the carrier should resist payment of the amount awarded one is compelled, under the provisions of section 16, to proceed in the circuit court for the enforcement thereof; if, however, one prevail in a court, the judgment is, of course, binding. Prior to the amending act of June 29, 1906, the carriers did not in many instances obey the order of the Commission in this class of cases. Since the passage of that act, however, the carriers have in general paid to the complainant the amount awarded.

Another matter deserving consideration is whether or not upon complaint the defendant will grant the relief asked in the petition without further proceeding; a number of cases are annually settled and discontinued on account of relief being thus granted by the carriers.²

These considerations, and perhaps others, must be weighed in each case in determining the selection of the forum. It should be kept in mind, however, that the jurisdiction of the Commission and the courts is not always concurrent,³ and where there is exclusive jurisdiction, in one or the other there is no choice in which forum to proceed.

Sec. 69. Limitation of actions.—Prior to the amending statute of June 29, 1906, the act to regulate commerce contained no provision respecting limitation of actions, and consequently the Commission and the courts were at liberty to hear and determine such cases as they might see fit. The courts, in accordance with the usual practice, followed the State statutes of limitations (see sec. 68, *ante*), and while the Commission was not called upon to pass upon the question directly, it would probably have entertained a proceeding unless the complainant was barred by laches.

The present provision of the statute concerning limitations is to be found in section 16:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the

¹ Formal complaints must be prosecuted with diligence (*Producers P. Line Co. v. St. L. M. & S. R. Co.*, (12 I. C. C., 186)).

² See 20th Ann. Rept. (1906), p. 36.

³ See secs. 30 and 31, *ante*.

circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this act may be presented within one year.⁴

It is manifest that this provision is not a general rule of limitations applicable to all complaints, but is intended only to apply to claims seeking reparation; there is no provision respecting limitation of actions having for their purpose the changing of rates or practices by the Commission.

Where a complainant attacks a rate or practice of long standing the right of a complainant is not barred by laches; and if the rate or practice is not enforced, although warranted by the published schedules the determination of the question will become either abstract or, if an order be made, it would be vain and useless (sec. 40, *ante*).

In claims seeking reparation the Commission had occasion to consider whether or not any limitation applied prior to the passage of the amending act of June 29, 1906, in a case where the question of limitation was directly raised.

State demands will not be granted:

INSTANCE.—In *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (10 I. C. C., 83), the Commission after determining that an association of cattle shippers was a proper party complainant and that the complaint in due form alleged that its members were compelled to pay an illegal charge and asked that the carriers be ordered to make restitution, said respecting the application of the statute of limitations:

"The defendants insist that if the individual members of the Cattle Raisers' Association, or any other persons who have paid this terminal charge, are allowed to recover in this suit the amount of such payments, then their appearance in the case must be treated as the beginning of a new action as of the date of such appearance, and that, therefore, a very considerable part of such claims would be barred by the statute of limitations. It is not definitely pointed out what statute of limitations would apply nor within what time such claim would be recoverable. The complainant meets this by saying that at common law there was no limitation of actions; that there is no limitation upon this right of action, which is created by a federal statute, unless imposed by some other federal statute; that the judiciary act prescribes the rule of limitation which shall be enforced in the federal courts, but that such act does not apply to this Commission since it is not a court; that no other statute fixes a limit of time within which claims like that under consideration shall be presented to the Commission, hence there is no such limitation.

"It seems to be true that no statute of limitations existed at common law; the Supreme Court of the United States has declared that but for the judiciary act there would be no time limit to the bringing of personal actions in the federal courts. (*Michigan Insurance Bank v. Eldred*, 130 U. S., 693.) The defendants themselves insist that this Commission is not a court, and this being so the judiciary act can not apply to proceedings before it. We are inclined to agree with the complainant to this extent, although it might not be a violent presumption to say that while the Commission is not and can not be a judicial body in the strict sense of that term, still when the Congress invested it with its present duties, when it

⁴ Claims accruing prior to the passage of the act of June 29, 1906, although heretofore the subject of some controversy as to the application of the provision respecting limitations were doubtless barred after August 28, 1907, being one year after the date the act took effect.

provided that suits for recovery of these damages might be prosecuted either before the court or before the Commission, it intended to provide that the same rule of limitation should obtain in whichever forum the suit was begun. On the whole, we do not think that the terms of the judiciary act in this respect would apply to the Commission; but does it follow from this that there is no limitation upon the time within which such suits shall be brought before it?

"The act provides that a party sustaining these damages may either bring suit in court or apply to the Commission at his election. If he brings suit in court in the first instance the statute of limitations prevailing in that State in which the suit is brought applies. On principle this conclusion must follow and such have been the adjudicated cases. (*Copp v. L. & N. R. Co.*, 50 Fed., 164; *Ratican v. Terminal R. Asso.*, 114 Fed., 666.) If, however, suit is commenced before the Commission resulting in an order, for the enforcement of which application is made to that same court no statute of limitations would apply according to the theory of the complainant. Hence, it must follow that by simply varying the manner of prosecuting his claim a party may determine whether the court giving final judgment shall or shall not apply a period of limitation.

"Again, while it is true that there was no statute or limitations as such at common law, equity refused to enforce stale claims and law courts presumed payment after a lapse of twenty years. While there may be no limitation of actions to-day except by statute, such statutes are universal and it would be difficult to find a right of action which has not also some limitation of the time within which suit for the enforcement of that right must be brought. But if the complainant is right violations of the act to regulate commerce may be prosecuted before the Commission without reference to the time when they accrued. While the failure to provide such a time limit would not nullify the statute, no such construction should be accepted unless irresistible.

"No order which the Commission makes is of binding effect unless enforced by proceedings in court. It would neither be the duty of the Commission nor of profit to the complainant to make an order which the court would not enforce. If, therefore, it were possible to ascertain what rule of limitation the court would finally apply the same rule should be followed by us. It has already been noted that if suit be brought in the first instance in court the statute of that State in which the suit is pending would be applicable. Would the same rule apply where the proceeding was begun before the Commission? The cause of action is really the same in both cases for this arises out of a breach of the statute and not from the order of the Commission.

"Counsel for the complainant answers that it is not the accruing of a cause of action, but the right to begin an action which puts in operation the running of a statute of limitations. If the complainant elects to proceed before the Commission he can not begin his suit in court until the order of the Commission has been made and the defendants have refused to obey it. Hence in a suit brought to enforce an order of the Commission the running of the statute dates not from the payment of the freight money, but from the time when the carrier was in disobedience of the order of the Commission.

"If the service of the petition to the Circuit Court for the enforcement of the order were to be treated as the beginning of that suit we should agree with this proposition, for otherwise a claimant electing to proceed before the Commission, as by statute he may, and beginning such proceeding while his claim was yet alive might find himself barred before he could obtain an order and file his petition for its enforcement, although proceeding with all diligence. We think, however, that the suit in court is not begun when the petition to enforce the order is filed, but rather by the filing of the original petition to the Commission. While this Com-

mission is not a court to which the judiciary act applies it may be so far an adjunct of the court, so far a part of the scheme by which these damages may be recovered, that the filing of the petition before the Commission may properly be considered a commencement of the litigation which finally results in a suit before the court." And see section 120, *post*.

In reparation cases the filing of the petition with the Commission is the beginning of the suit before the court:

INSTANCE.—In *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* the Commission, after quoting section 16 (as in the former act), said:

"A consideration of the above language shows that while the cause of action upon which the suit at law is based is not the order of the Commission, and while the issue before the court is whether there has been a breach of the act to regulate commerce, still the suit in court is a continuation of the proceedings before the Commission. If the party injured elects to take his remedy before the Commission he must begin his suit there; he can begin it in no other way; and the subsequent proceedings in court are a continuation of the suit which he begins there. Congress had complete control of this subject. It might have enacted that the beginning of proceedings before the Commission should be treated as the beginning of the suit subsequently brought in the Circuit Court. It seems to us the least difficult way out of the many difficulties besetting the solution of this question to hold that the Congress did in effect so provide, and that the filing of the petition before the Commission is the beginning of the suit which is finally brought in the Circuit Court to enforce an order for reparation made by us."

Under the present statute, the general principle applying to statutes of limitation govern:

INSTANCE.—In *Mo. & K. S. Assn. v. A. T. & S. F. R. Co.* (13 I. C. C., 411) the Commission held that until a definite cause of action had been pleaded the statute of limitation continues to run. Referring generally to the statute of limitation the Commission said:

"In applying to complaints filed before it the limitation thus enacted into the act to regulate commerce, no reason is perceived why the Commission should not be guided by the general principles under which statutes of limitations are applied to actions brought in courts of justice. And the universal rule in the courts seems to be that, under a system of pleading which permits a proceeding for damages to be instituted by the filing of a complaint, the statute of limitations does not cease to run against the demand until a complaint has been filed setting up the claim with sufficient particularity to make an issue; in other words, until a definite cause of action has been pleaded there is nothing to arrest the running of the statute. There are, moreover, special reasons, under various sections of the amended act, for holding that none of these complaints, as drawn, can be said to set up a cause of action or to be sufficient to stop the running of the statute against the claims of the individual members of the complainant association. Conceding under the terms of section 13 that a voluntary association may attack an existing rate on behalf of its members, it may be said, on general grounds of convenience, that such an association may also ask for reparation on previous shipments made by them under the rate attacked. But it is clear that no demand for damages by such an association should be entertained, now that a period of limitation has been incorporated in the act, or can be said to state the complaint or cause of action so as to stop the running of the limitation, that does not definitely name the member or members on whose behalf the claim for reparation is made. It is under the authority of section 16 that the Commission is authorized to enter

an order making an award of damages. That section gives to the Commission the power, after a full hearing upon a complaint made and when it shall have determined 'that any party complainant is entitled to an award of damages,' to make an order directing the carrier 'to pay to the complainant' the sum awarded. In any such proceeding there must therefore be a party complainant who is entitled to damages, and the order must direct the carrier to pay the sum awarded 'to the complainant.' It is clear, then, that any complaint under which an award of damages is sought by a voluntary association of this kind, which can make no claim on its own behalf, must be filed on behalf of a definitely named party in interest. This thought is emphasized by the language of section 8 which provides that for an unlawful act or omission a carrier 'shall be liable to the person or persons injured;') and also by the language of section 9, which provides 'that any person or persons claiming to be damaged * * * may either make complaint to the Commission * * * or bring suit * * * in any district or circuit court of the United States * * * but such person or persons shall not have the right to pursue both the said remedies.'

"The distinction between a mere form of action and the essential nature of a cause of action must not be overlooked. The form of action is usually provided by statute; the cause of action ordinarily arises through some act or omission of the parties. And all the elements fairly necessary to present the cause of action must be pleaded in a complaint filed with the Commission. This is made especially clear by the language of section 13, which requires the Commission, when a complaint has been filed, to forward to the defendant 'a statement of the charges thus made' and to call upon it 'to satisfy the complaint or to answer the same in writing within a reasonable time.' And therefore unless the complaint brought by a voluntary association definitely names those of its members on whose behalf reparation is demanded, and describes the shipments on which reparation is claimed with sufficient particularity to enable the Commission to forward a statement of the charges to the defendant and to call upon it to satisfy the claim or answer the same in writing, it is clear that a cause of action has not been stated in the form and manner required by the law or in such manner as to stop the running of the period of limitation provided in section 16. The defendant, under section 13 of the act, has the right, upon receiving the statement of the charges made, to relieve itself 'of liability to the complainant, for the particular violation of law thus complained of' by making 'reparation for the injury alleged to be done.' This is a definite provision in the law and a definite *locus penitentie* which the defendant has in order to determine whether it will yield to the demand made, under a proper order to be entered by the Commission, or contest it. The defendant therefore has the right to have the complaint so stated as to afford it the necessary information to enable it to determine whether to request the authority of the Commission to satisfy the demand or to make a formal answer. And when the demand is made on behalf of unnamed shippers and on shipments that are not specified with reasonable particularity, this opportunity is not open to the defendant. Under the general rules of pleading and more clearly under the special language of this act we therefore hold that no complaint by a voluntary association which fails to name the actual parties in interest on whose behalf reparation is demanded or which fails, in the petition itself or in some exhibit attached to it, to describe with reasonable particularity the shipments with respect to which damages are claimed, can be said under the amended act to state a cause of action. And the filing of such a complaint can not stop the running of the period of limitation provided in the act, since no cause of action, formal or informal, is alleged."

And in *Nicola, Stone & Myers Co. v. L. & N. R. Co.* (14 I. C. C., 199) the Commission said:

"This provision, as we understand it, means that any claim, whether the cause of action upon which it is based accrued prior or subsequent to the effective date of the act, may be presented to the Commission within two years from the date of the accrual thereof; and that as to causes of action that accrued prior to August 28, 1906, the claim may be presented at any time prior to midnight of August 28, 1907, although such cause of action may have accrued more than two years prior thereto. The intent of the proviso is, in our opinion, to prevent such a construction of the preceding part of this provision as to cut off claims upon previously accrued causes of action as to which the two years had already run, or so nearly so that it would be impracticable for the claimants to present their claims within such period."

Sec. 70. The proceedings in a case before the Commission.—The several proceedings or steps in a case before the Commission, chronologically considered, are:—

First. A petition is filed corresponding with the petition or bill in equity.

Second. Notice is issued and service thereof made upon the defendant or party complained of, conforming to and corresponding with the process of subpoena in courts of the United States requiring defendant to satisfy the complaint or to appear and answer the same.

Third. The filing of defendant's answer as in equity, which makes up or forms the issue or issues.

Fourth. The issuance of subpoenas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer.

Fifth. The assignment of a time and place for the hearing, when and where the parties appear in person or by attorney—witnesses are sworn and examined, and arguments are made orally or by brief, or by both.

Sixth. When the conclusion is reached a written report corresponding in all respects to an opinion is delivered, filed and published.

Seventh. The order of the Commission is recorded by its secretary as decrees in equity are recorded by clerks of court, and—

Eighth. A copy of such order, under the seal of the Commission, issues to the parties. If relief is granted it is commanded that the defendant obey the order; if the petition is not sustained it is ordered that the proceeding be dismissed.

This mode of practice certainly conforms in many respects to the regular practice of courts and is no doubt authorized by the law.⁵

It is intended that the procedure before the Commission shall be speedy and not dilatory:

INSTANCE.—In *Riddle, Dean & Co. v. P. & L. E. R. Co.* (1 I. C. C., 490) the Commission said that the statute is to be construed as dealing with the substance

⁵ *K. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 567).

of things and contemplating as far as possible methods of procedure which are speedy and which come at once to the very right of questions arising in the interstate transportation of persons and freight.

In *re* Procedure Concerning Questions of Law (1 I. C. C., 490), the Commission held that dilatory proceedings will be considered objectionable, and that a speedy hearing would be desired in every case; and that all proper questions would at the hearing be entertained, whether jurisdictional or relating to the merits of the controversy.

Sec. 71. Pleadings before the Commission.—"It is intended that all its [Commission's] proceedings shall be in the simplest form consistent with a reasonable degree of certainty." Pleadings before the Commission consist of the complaint and the answer, all other formal pleadings being dispensed with.

In pleading, it is well, however, to remember that the complainant is declaring and the defendant defending on a statute; the general rule laid down by Chitty⁷ for pleading under a statute is applicable.

Sec. 72. Rules of pleading.—The rules of pleading, particularly Federal equity pleading, serve before the Commission; no technical rules, however, apply. What the Commission desires is that the complainant should state such facts as show a violation of the act, without evidence, long recitals, or unnecessary matter; that the defence shall set up such facts as deny the facts in the complaint, or set up such facts as excuse or avoid the alleged violation.

The Rules of Practice (No. III)⁸ provide: "Complaints must be by petition setting forth briefly the facts claimed to constitute a violation of the law."

Sec. 73. Classes of complaints.—Complaints to the Commission are either (a) informal, or (b) formal.

The informal complaint is made by a letter in which some act or omission of the carrier is alleged to constitute a violation of the act; such a complaint receives a number and by addressing the carrier the Commission seeks to have the matter amicably adjusted. Failing in this, the complaint may become a formal one upon the filing of a petition in due form; in fact, many formal complaints arise out of the refusal of the carrier to correct the rates and practices complained of informally, it either denying the facts alleged or wishing to defend on legal grounds.

Informal complaints are of either of two kinds: (a) Those seeking a

⁷ *Re* Procedure in Cases at Issue (1 I. C. C., 223).

⁸ Chitty on Pleading (16 Am. Ed., Vol. 1, p. *386): "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant, appear to have been within the provision of the statute, and all circumstances necessary to support the action must be alleged. * * * If, however, the necessary matter be stated in substance and effect it will suffice, although the precise words of the statute are not used."

⁹ Appendix.

correction of alleged abuses, or (b) those seeking reparation for alleged overcharges in shipments.

The former class results from the desire of the Commission to amicably settle controversies between shippers and carriers. When one takes up with the Commission a matter which he conceives to be in violation of the law, the Commission calls the attention of the proper traffic official of the carrier to the grievance and attempts to adjust the controversy, whether it be a matter of rate or practice.

Informal complaints seeking reparation for unlawful charges are very numerous, aggregating 500 or more per year. These cover requests for refund on account of excessive rates, misrouting, misconstruction of tariff, errors in tariff, charging less than carload instead of minimum carload rates, excessive switching charge, collecting local instead of joint through rates, erroneous cancellation of rates, improper exaction of demurrage charge, and, in fact, all manner of claims which may be made against a carrier, where the question of charges for transportation or service in connection therewith is involved.

An informal complaint seeking reparation and with definite specifications is a "complaint for the recovery of damages * * * filed with the Commission" (see sec. 69) and will prevent the running of the limitation provisions of the act, if received within two years from the time the cause of action accrues.

The Commission probably will not receive and file complaints, either formal or informal, involving "loss and damage" claims or claims seeking the damages where through an error a greater rate than is permitted by the published tariff has been charged. In such cases the user of transportation facilities must avail himself of his remedy before the courts.

The character of cases of which the Commission will take cognizance by informal complaints, and the rules applying thereto are set forth in Administrative Rulings and Opinions, Rule 81.⁹

Formal petitions may be filed against carriers and others¹⁰ subject to the act alleging the violation of any of the provisions or prohibitions of the act. The provisions and prohibitions of the act are divisible into two classes: First, those for the direct benefit of the users of transportation facilities, such as that rates shall be reasonable and not unduly discriminatory; and second, those that are incidental to the first, such as the provisions respecting the keeping of accounts and prohibitions against keeping accounts other than those prescribed by the Commission.

While technically a complainant, as provided in section 13 of the act, would have a right to file a complaint alleging violations of the

⁹ See Rule 81 of Tariff Circular 15-A for Special Reparation on Informal Complaints (Appendix).

¹⁰ See sec. 2, Elkins law (Appendix).

act of the last-mentioned class, yet, it would usually avail him nothing. The keeping of accounts, or failure to keep accounts, will not ordinarily be of such moment to a complainant, certainly if a shipper, as will induce him to make a complaint respecting the action of the carrier.

As to the provisions and prohibitions directly for the benefit of the users of transportation facilities, the complaint must allege a violation of one or more of them, and seek the relief provided by law to be given.

Formal petitions may make one or more of the following allegations:

1. Violations of section 1 of the act.
 - (a) That rates are unreasonable and unjust *per se*.
 - (b) Failure to make switch connections.
2. Violation of section 2 of the act (unjust discrimination between persons).
3. Violation of section 3 of the act.
 - (a) Undue and unreasonable preference or advantage (or undue and unreasonable prejudice and disadvantage) to (1) persons, (2) localities, or (3) particular description of traffic.
 - (b) Failure to furnish facilities for interchange of traffic.
4. Violation of section 4 of the act.
 - (a) Violation of long-and-short haul provision.
 - (b) Application in nature of an answer by carrier seeking relief under section 4.
5. Violation of section 6 of the act, failure to post tariffs.
6. Violation of section 7 of the act, regarding continuous carriage.
7. Violation of the provisions of section 15 of the act.
 - (a) As to regulations and practices of carriers.
 - (b) As to the making of through routes and joint rates.
 - (c) As to the just and reasonable charge to be paid by the carrier for service performed by the owner of the property to be transported.
8. As to the issuance of receipt or bill of lading as required by section 20.

Sec. 74. Form and requisites of the complaint.—The parts of a formal complaint are substantially the same as the parts of an original bill in equity in the Federal courts. As is customary in that practice, no jurisdictional clause is inserted and the confederacy clause is used only in rare instances but is made a part of the petition when the circumstances justify it. The required allegation that the defendants are common carriers engaged in the transportation of (passengers or) property wholly by the railroad, etc., following the language of sec-

tion 1 to such an extent as may be necessary, is a sufficient averment to give the Commission jurisdiction.

Not infrequently the complainant conceives that the existing rate, regulation, or practice exists because of an agreement among the defendants and that agreement is in violation of the Sherman anti-trust law;¹¹ in such cases an allegation to that effect is not uncommon.¹² The value of such an allegation is doubtful except in cases involving a rate recently advanced or where the complainant desires to lay a foundation or seek information for proceedings under the anti-trust law. It is well known that few rates are competitive but are "agreed rates" and proof of that fact is not dependent on specific allegation in the complaint.

The parts of a Formal Petition before the Interstate Commerce Commission are:

- I. Caption.
 - (a) "Before the Interstate Commerce Commission."
 - (b) Names of parties, complainants, and defendants, and docket number.
- II. Address.

"To the Interstate Commerce Commission."
- III. Introduction.
 - (a) Description of complainant, business and interest in the proceeding.
 - (b) Description of defendant, occupation and clause stating that it is subject to the act or interested in the complaint.
- IV. Stating part.
 - (a) Setting up facts which in the view of the complainant constitute a violation of the act and setting out the particular portion or portions of the act alleged to be violated.
 - (b) Effect of action or inaction or practice of the defendant on complainant's business.
- V. Charging part.
 - (a) Concurrences of defendants in tariffs.
 - (b) Concerted action of the defendants to bring about the existing rates, practices, etc. (This is only used when to advantage and the circumstances warrant.)
 - (c) Alleging the pretences by which the defendant excuses or justifies the rates or practices. This is occasionally of value, for if properly stated and the defendant has no other defense than alleged, argument may be had on petition and answer.
- VI. Prayers.
 - (a) For service of complaint and answer.
 - (b) For such special relief, as in view of the facts stated in the petition and the act, the complainant thinks he is entitled.
 - (c) For general relief.
- VII. Conclusion.
 - (a) Date and place of signing.
 - (b) Signature of complainant and counsel, with address of each.¹³

¹¹ An act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890 (26 Stat. L., 209).

¹² For the relation between the Commission and this act, see section 59, *ante*.

¹³ Verification of petition is no longer required.

Sec. 75. What the petition should contain.—The petition for an order, whether or not praying reparation, “shall briefly state the facts” (sec. 13). It ought to contain, of course, every fact “essential to the complainant’s right and to obtain the relief prayed for; such facts as are pleaded ought to be pleaded with certainty, accuracy, and precision and to a common intent. It is not necessary that minute facts or collateral circumstances be set out, but there is no objection to alleging these facts, if they will be of value, by the admission of the defendant, or assist in determining the issues of the case.

Neither matters of evidence nor matters of which the Commission will take judicial notice ought to be alleged.

A complaint must state a reasonable ground for investigation.¹⁵

A petition may be so broad that the relief prayed for cannot be granted:

INSTANCE.—In *Natl. Petroleum Assn. v. A. A. R. Co.* (14 I. C. C., 272) where there were 51 defendants and the complainant challenged the rates on petroleum generally in official classification territory on the alleged ground of unreasonable and undue preference and the record did not indicate which of the defendants the order should run against and there was no showing upon the record that the classification of petroleum was unduly discriminatory, but the Commission was asked to reduce by one sweeping order thousands of rates concerning which no specific complaint had been made and no rates offered, it was held that an omnibus complaint of this nature should be dismissed.

The Commission said: “We can make no such wholesale order as is prayed for in this proceeding. If any of these rates are excessive or operate to effect forbidden discriminations, as may be the case, they are the rates of one or more carriers against which a definite and specific complaint can be directed; and if the showing now made furnished no adequate basis for declaring any particular rate unlawful or entering an order against any particular defendant, as in our opinion, it certainly does not warrant the condemnation of all the rates in question and a sweeping order against the whole list of defendants.

“The complaint is dismissed without prejudice, and an order will be entered accordingly.”

A complaint having for its purpose retaliation does not commend itself to the Commission:

INSTANCE.—In *Slater v. N. P. R. Co.* (2 I. C. C., 359) it was held that a complaint made for the purpose of retaliation for a fancied wrong in order that the complainant might get even with a carrier for the revocation of his pass is a complaint that does not commend itself to the Commission.

¹⁴ The Rules of Practice (Rule III) provides: “The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition.” In *Chamber of C. v. G. N. R. Co.* (5 I. C. C., 571) it was held that a complaint should be directed against an aggregate through rate where it appeared that a local rate is also a proportion of the through rates, which was the real subject of controversy, and all carriers composing a through line are necessary parties.

¹⁵ *La Crosse M. & J. Union v. C. M. & St. P. R. Co.* (1 I. C. C., 629).

A complaint insufficiently charging a violation of the act will be dismissed:

INSTANCE.—In *White v. M. C. R. Co.* (3 I. C. C., 281), where a complainant charged that the defendant carriers were subject to the act to regulate commerce and had been accustomed to make dockage from wheat delivered by a farmer to the buyer at the elevators of the defendants and that the farmer thereby suffered to the extent of the reduction but failed to allege that the wheat was delivered for interstate transportation, it was held that the complaint was insufficient in substance to show a violation of the act to regulate commerce and that the defendants were entitled to have it dismissed on a motion to that effect.

If a complaint attacks the reasonableness of a rate, either relatively or *per se*, custom and the rules of the Commission require that in the complaint it should be alleged not only that the existing rate or rates are unreasonable and unjust, but what rate or rates would, in the view of the complainant, be reasonable and just.

Sec. 76. Form of allegations.—While the allegations of a pleading should be certain, definite, and precise, yet it is not necessary that the party pleading should have absolute knowledge of the facts to which he subscribes. He may have information of various degrees. It may be positive and definite or it may be hazy and uncertain. The practice permits a statement of facts, whether the party pleading have definite and positive information, or whether it be by way of hearsay or belief. Formerly when pleadings were verified, the knowledge of the complainant was necessarily more precise, accurate, and full than under the present practice.

The petition must be sufficient to advise the defendant of the nature of the complaint:

INSTANCE.—In *Mo. & K. S. Assn. v. A. T. & S. F. R. Co.* (13 I. C. C., 411) the Commission said: "The defendant * * * has the right to have the complaint so stated as to afford it the necessary information to enable it to determine whether to request the authority of the Commission to satisfy the demand or to make a formal answer." While the Commission was speaking of a complaint demanding reparation the defendant doubtless has the right to insist that all complaints shall conform to the rule here stated.

General averments will not sustain claims for reparation:

INSTANCE.—In *M. & K. S. Assn. v. A. T. & S. F. R. Co.* (13 I. C. C., 411) the Commission indicated the form of allegations necessary to stop the statute of limitations running against reparation claims, and held that, where a complaint by a voluntary association asking reparation in general terms, but did not name the members on whose behalf it was filed and did not with reasonable particularity specify and describe the shipments, the filing of the complaint would not stop the running of the statute of limitation.

In *Cattle Raisers' Association v. C. B. & Q. R. Co.* (10 I. C. C., 83) the Commission suggested respecting claims for reparation by members of a voluntary association as follows: "It would probably be well for the members of this association who seek damages to file a claim in the nature of an intervening petition stating that they are members of the association; have paid the charges in

question, and seek to recover the same in this suit. Such statement should also be accompanied by a specification giving as definitely as possible the dates and amounts paid."

In answers, as in the petition, the allegations should be sufficiently definite and precise to advise the complainant of the nature of the defense and of the facts on which the defendant relies:

INSTANCE.—In *Raworth v. N. P. R. Co.* (5 I. C. C., 234), where a complaint had been made alleging a violation of the fourth section it was held that the carrier must in the answer advise the complainants of the facts and circumstances relied upon as constituting the defenses.

Sec. 77. Anticipated defenses.—Where the defenses are known to the complainant and he conceives that such defenses are not warranted in law or in fact he may plead them in the complaint and negative the facts or deny the legality of the defense. The advantage of such pleading, if true, is apparent. Where the question is purely one of law, no hearing for the purpose of taking evidence is required and the matter resolves itself into a legal argument and the decision of the Commission thereon.¹⁰

Sec. 78. Technical terms and abbreviations.—The use of technical terms and abbreviations "in the pleadings is permitted, if, however, the terms or abbreviations are not in general use they should not be used or, if used, explained. Names of parties, complainant and defendant, should be in full and not abbreviated.

In abbreviating the titles of railroads, custom sanctions the use of the initial letters, except St. for Saint; Ste. for Sainte; Ft. for Fort; S. W., N. W., etc., for Southwestern, Northwestern, etc.; R. R. for Railroad; Ry. for Railway, and R. may be used for both railroad and railway; Co. for Company. Thus, M. & St. L. R. R. for Minneapolis and Saint Louis Railroad. States may be abbreviated, as St. L. S. W. Ry. Co. of Tex., for Saint Louis Southwestern Railway Company of Texas. The exception to the foregoing rule is the Maine Central Railroad, the abbreviation for which is Me. C. R. R.; the Michigan Central Railroad having the abbreviation M. C. R. R.

Sec. 79. Pleading written instruments.—In setting out contracts and other documents, not part of the files of the Commission, they should be pleaded as to their legal effect and not inserted in the body of the complaint in *haec verba*. They may be annexed as exhibits, if desired.

Under the present act it is provided in section 6 that—

every common carrier subject to this act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers

¹⁰ As an example of pleading an anticipated defense see Appendix, Form No. 11.

¹¹ Reference is made to such technical terms as are in common use in transportation works, such as "tariff," "basing points," "differentials," "arbitraries" and the like; abbreviations in common use in railroad circles are permitted, such as "O. R.," "C. I. F.," "C. A. F.," "C. L.," "L. C. L." and the like.

in relation to any traffic affected by the provisions of this act to which it may be a party.

For contracts required to be filed see rule 59, Tariff Circular 15-A.

If a party to a complaint relies upon such a contract, agreement, or arrangement it is not necessary to do more than make reference to the same in the pleadings in the usual way.

If one desire to set up a schedule or tariff which is on file in the office of the Commission the reference¹⁸ to it by number, date effective, and other distinguishing features is sufficient. Such instruments ought not to be made a part of the complaint and need not be annexed as exhibits.

Sec. 80. Prayers.—The prayers¹⁹ for relief to a petition are much like those to a bill in equity but without the formality of them; custom does not require that they be numbered, although they may be. Prayers are for service of the complaint, for hearing and investigation, and for an order or orders commanding the carriers to cease and desist from the violations of the act alleged in the complaint; and in appropriate cases, for reparation, for through routes, for correction of practices. Other prayers appropriate to the relief sought may be added concluding with the prayer for general relief.

The prayers, of course, ought to be in harmony with the relief to which the complainant is entitled under the petition and in consonance with the relief which the Commission is authorized to grant. The complainant can not secure an order granting specific relief in matter which has not been set up in the complaint or on which testimony has not been introduced. As the Commission is lenient respecting the subject matter on which testimony may be given, one may have relief under the general prayer for relief although there be no allegation in the pleadings to sustain the violation concerning which evidence has been given.

A prayer for relief may be so broad that the Commission will not feel warranted in granting it. Thus, in *Natl. Petroleum Assn. v. A. A. R. Co.* (14 I. C. C., 272) the Commission held that it could not make a "wholesale order;" and where the practice was in general use by several carriers it was held that the Commission would not condemn it in a case where a few carriers only were parties to the suit (*Commercial Club v. N. P. R. Co.*, 13 I. C. C., 288).

¹⁸ Schedules of rates filed with the Commission bear a tariff number, being numbered consecutively for each carrier. Tariffs are usually referred to as "A and B Railroad Company, tariff No. I. C. C., 337, being rates on various commodities between points shown therein." Where the tariff is for transportation of commodities over more than one railroad it is customary to allege that the tariff has been concurred in by an intermediate or final carrier (as the case may be) in accordance with law and rules laid down by the Commission then stating the concurrence form and number as, "Ex 2 No. 60." The form of concurrences is prescribed by the administrative rulings (Tariff Circulars 15-A; 16-A).

¹⁹ See forms of prayers in Appendix.

Prayer asking relief which the Commission has no authority to grant ought not be used:

INSTANCE.—In *La Crosse M. & J. Union v. C. M. & St. P. R. Co.* (1 I. C. C., 629) it was held that a prayer in a petition that a carrier be required to make its rates from one terminus of the town from which the petition proceeds and to other towns in the same section, and also from such terminus to the petitioning town and from thence to such other towns on a uniform and clear mileage basis could not be granted as the Commission had no power to require the adoption of such basis.

Sec. 81. Verification.—Formerly,²⁰ both complaint and answer were verified in the usual equity manner by the oath of parties. Now, however, no verification is required except in petitions by carriers for relief under the fourth section of the act involving the long-and-short haul provision.

Sec. 82. Matters not known to party pleading and matters peculiarly within knowledge of adverse party.—It not frequently happens that facts desired to be set up by the pleader are unknown to him, and they may or may not be known to the adverse party. The usual rules of pleading applicable to such cases are safe to follow. One may allege that certain facts are unknown to the pleader but he may state that he believes them to be true, or he may set them out in part and allege that his adversary has full and complete knowledge thereof and ask a disclosure in respect thereto. The procedure is analogous to a bill or prayer for discovery and may be effective in the same way.

Sec. 83. Effect of omission to make proper allegations.—If a complaint be transmitted for filing and it does not state a cause of action under the statute it will ordinarily be returned²¹ with a letter stating the defects and requesting a redrafting of it in accordance with the act and the Rules of Practice. Such delay is often burdensome to the complainant and if seeking reparation may involve the limitation provision.

If the defect be one not apparent on the face of the complaint, such as want of parties or failure to allege all the violations of the act which the complainant should set up, it will be filed and served, if otherwise proper. Even after answer amendment to cover these defects may be permitted or evidence may be adduced and received tending to show violations other than those specified. Amendment²² in a material particular without notice, however, will not be allowed; nor will the amendment stand if it cause surprise. The carrier is entitled to know the charge against it in order that it may prepare to meet it. The necessary allegations and all violations of the law proposed to be considered ought to be set out in the complaint.

Sec. 84. Conclusiveness of allegations on party pleading—Waiver of

²⁰ Rule IV of Rules of Practice, as originally adopted (1 I. C. C., 2).

²¹ In *La Crosse M. & J. Union v. C. M. & St. P. R. Co.* (1 I. C. C., 629) it was held that a complaint would not be filed if it contain no reasonable ground for investigation.

²² See sec. 76, *ante*.

part of allegations.—The allegations of a petition or answer are not technically conclusive on the party pleading. He is not estopped by an allegation, nor is he ordinarily precluded from changing his ground of action or defense unless such change would affect a surprise to the opposing party. A complaint may have no allegation to support a particular line of testimony, yet the evidence is usually received “for what it is worth;” so, also, a defendant carrier may have omitted a defense in its answer yet it is permitted to adduce evidence in support thereof whether the new defense be in addition to or even in part inconsistent with the defense pleaded.

It not infrequently happens that where the complainant has made numerous allegations he finds at the hearing that he is either without evidence to support some of them or that, if proven, they would not constitute a violation of the law. In such cases it is the practice for the complainant to state upon the record that he does not propose to adduce testimony upon, or make argument concerning the particular allegations, thereby waiving his right to proceed thereunder. Such was done, although there was no formal complaint, in *Re Differential Freight Rates* (11 I. C. C. 13) where at the request of commercial organizations the order of investigation of the Commission was broad enough to include the consideration of differential rates on all kinds of traffic to and from the Atlantic ports, but by agreement at the opening of the first hearing the case was limited to export and import traffic.

Sec. 85. Amendments.—The Commission is liberal in permitting amendments to be made to the pleadings, but it will not permit a complainant to make amendments that would in effect make a new case,²³ nor substitute for the original cause of complaint something quite distinct and different²⁴ from that originally alleged.

Amendment to a petition creating new issues will not be permitted:

INSTANCE.—In *Riddle, Dean & Co. v. B. & O. R. Co.* (1 I. C. C., 372) the original complaint alleged unjust discrimination in furnishing cars to a specified coal mine during a particular month for shipment to the designed consignees; the proposed amendment was for the purpose of showing unjust discriminations by the same defendants against other mines in the furnishing of cars for other points and for different periods than mentioned in the original complaint. The Commission said: “This amendment thus brings forward, for the first time, mines alleged to have been discriminated against in shipments to points nowhere referred to in the original complaint, and charges violations of the statute against these mines and in these shipments, occurring a considerable period of time after the original complaint was filed, and some of them, in fact, after the original complaint had been answered by the defendant railroad company. The grievances stated in the amendment are new and distinct, entirely separate from, and having no relation to, the grievances mentioned in the original complaint.

²³ *Delaware State Grange v. N. Y. P. & N. R. Co.* (2 I. C. C., 309) but amendment is not necessary to bring in matters that would have been the subject of proof under the original complaint.

²⁴ *Riddle, Dean & Co. v. B. & O. R. Co.* (1 I. C. C., 372).

"In considering complaints and amendments, such as are made and proposed, the Interstate Commerce Commission, under the statute, performs duties that are in their nature judicial. Liberal as our practice has heretofore been, and will continue to be, in allowing amendments to complaints and answers in proceedings before us in the administration of a highly remedial statute, yet there must, under the rules of law, be a limit to this power of amendment; and this limit, we think, would be passed in allowing the amendment here proposed. The alleged grievances averred in this proposed amendment do not constitute grounds of complaint under the circumstances proper to be brought in by way of amendment to the original complaint in this proceeding. That portion of the proposed amendment which charges that the defendant company gave a preference 'to shippers of coke on the line of their road by furnishing said coke shippers with more than their proportion of box cars each day for shipment of coke during the aforesaid months' is equally obnoxious to the objection above stated. The matters mentioned in this proposed amendment may be subjects for a new petition if complainants desire to present such a complaint, but not by way of amendment to the original petition." The amendment was disallowed.

Where it was erroneously stated in a petition that a receivership had existed until a reorganization and that under the reorganization G. was president and service was had on him, and the answer was verified and filed by P. the president, amendment was allowed at the hearing.²⁵

Sec. 86. Formal defects in pleadings—Scandal and impertinence—Multifariousness—Departure and variance.—As none of the technical rules of pleading or evidence apply in proceedings before the Commission it will be unavailing to raise questions involving a consideration of such formal defects as scandal, impertinence, multifariousness, departure and variance.

The Commission has no general rule respecting scandal and impertinence. In aggravated cases a motion to strike out, or exceptions thereto, would probably be granted upon hearing.

Ordinarily multifariousness is not objectionable, either in complaint or answer. The usual practice, when multifariousness occurs in a complaint, is for the defendant to disclaim interest as to a part and answer as to those facts which concern it.

The better practice to avoid multifariousness is to file separate complaints and after issue to apply for a consolidation²⁶ of cases.

As there is no replication²⁷ there can be no departure. It not infrequently happens that the evidence is at variance with the allegations, such evidence having been received by the Commission under its powers of investigation; in such case relief is granted, although the relief asked in the moving papers may not accord with that given.

²⁵ Reynolds v. W. N. Y. & P. R. Co. (1 I. C. C., 347).

²⁶ An illustration of consolidation of cases, with general opinion and special opinions, where warranted, is to be found in Haines v. C. R. I. & P. R. Co. (13 I. C. C., 214); nine cases were consolidated, with special opinions in eight.

²⁷ Re Procedure in Cases at Issue(1 I. C. C., 223).

Cases in which reparation is not specifically prayed for may be held open that complainants may have opportunity to present such claims.²⁸

Sec. 87. Admissions.—Parties to the proceedings are bound by the admissions made in the pleadings but not to such an extent as is usual in courts. The better practice is to have an admission made verbally at the hearing in addition to the admission made in the complaint or answer. An admission made by a complainant or a defendant does not bind a co-complainant or a co-defendant; neither will an admission in one case bind the same party in another case involving similar issues. An admission by an agent will bind the principal but not if made prior to the institution of proceedings.²⁹

Admissions may occur in the pleadings, or presumptions in the nature of admissions may arise from the evidence.

The averment of a defense binds a carrier and it is under a duty to introduce evidence thereunder.

INSTANCE.—In *R. Com. v. Clyde Steamship Co.* (5 I. C. C., 324) it was held that where a carrier, after complaint alleging a violation of the fourth section, averred substantial dissimilarity in circumstances and conditions that it was concluded by its pleading and must affirmatively show such circumstances and conditions as will justify a greater charge for a shorter haul; but the rule is different if an application be made by a carrier for relief under the fourth section (see section 121).

A long-continued rate or practice may create a presumption in the nature of an admission of the reasonableness thereof:

INSTANCE.—In *National Hay Association v. L. S. & M. S. R. Co.* (9 I. C. C., 264) it was held that where a defendant had kept a commodity in a certain class for thirteen years or more with the exception of a short period it was evidence that the classification and rates were reasonably high and while the continuance of the classification and rates was not conclusive evidence of the reasonableness thereof it was in the nature of an admission against the carriers tending to show the unreasonableness of an advance.

Sec. 88. Exhibits—Bill of particulars.—It is permitted to attach exhibits to pleadings, but there is no necessity for attaching tariffs or schedules, mere reference by name, number, and date effective being sufficient.

A bill of particulars should be filed with a complaint seeking damages, in order that the defendant may be apprised of the money claim of the complainant. The bill should be as full as needed to inform the carrier and, if for and on account of shipments, should contain the names of consigner and consignee, car number and initial, date and place of shipment, destination, weight, commodity, freight paid, and amount claimed. The way bill reference may be furnished if avail-

²⁸ For cases held open for proof of reparation see *Jurisdiction to Determine Entire Controversy* (sec. 32, *ante*.)

²⁹ *Michigan Cong. Water Co. v. C. & G. T. R. Co.* (2 I. C. C., 594).

able.⁸⁰ If in order to preserve rights against the limitation provision supplemental bills of particulars may be filed from time to time.⁸¹

A bill of particulars should be definite and precise:

INSTANCE.—In *Chesapeake and Ohio Canal Co. v. Knapp* (9 Pet., 541) the court said: "There can be no doubt that a bill of particulars should be so specific as to inform the defendant, substantially, on what the plaintiff's action is founded. This is the object of the bill, and if it falls short of this, its tendency must be to mislead the defendant, rather than to enlighten him."

The plaintiff at law will be confined ordinarily to the demand stated in his bill of particulars but in some jurisdictions amendment by leave of court is allowed. The Commission has not had occasion to determine this question but it is manifest that no amendment would be permitted the purpose of which is to evade the limitation provision.

Sec. 89. Filing of complaint—Copies of complaint—Service of complaint.—A formal complaint is transmitted the Commission in person or by mail with a request that it be filed and served. It is examined by the Commission in order to determine whether it charges a violation of the act and whether it contains the proper prayers for relief; if it meets with these requirements it is served on the defendant⁸² by registered mail, with an order requiring answer thereto within a specified time; this is usually twenty days but for good cause the Commission often specifies a shorter time.

On filing and docketing the complaint it is given a number and the complainant or his attorney is advised of the receipt of the complaint, the docket number and that service has been made.

The complaint should be either typewritten or printed, and at least one copy should be signed in ink by the complainant or his authorized agent. A sufficient number of copies of the complaint must be transmitted in order that the Commission may have three for its files and one copy for service on each defendant.

Sec. 90. Time of filing pleadings.—The time for filing a petition is, of course, within the discretion of the complainant; if the complainant seeks reparation he will avoid by early filing the operation of the limitation as provided in section 16 of the act.

The time within which the defendant shall answer the petition is fixed in the order requiring an answer; the time is usually twenty

⁸⁰ See *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (10 I. C. C., 83), *M. & K. C. Shippers' Assn. v. A. T. & S. F. R. Co.* (13 I. C. C., 411), *Nicola, Stone & Myers v. L. & N. R. Co.* (14 I. C. C., 199)

⁸¹ In filing supplemental bills of particulars it is necessary to file sufficient copies for service upon the carrier or carriers interested; thus, if under an order of the Commission a claim for reparation is made, at least two copies of each bill of particulars must be filed, one for the files of the Commission and the other for service upon the carrier to whom the freight charges were paid.

⁸² Service on a controlling company, when a subsidiary company should have been served, was held valid in *Mayor & Council of W. v. A. T. & S. F. R. Co.* (9 I. C. C., 534).

days but for cogent reasons the Commission may require the answer in less time; and on application by the defendant it may be extended.

The Rules of Practice (Rule III) provide: "The complainant must furnish as many copies of the petition as there may be parties complained against to be served and three additional copies for the use of the Commission."

Sec. 91. Appearances.—Practice before the Commission does not require appearance by the defendant or his attorney except as is inferred from the filing of the answer. No distinction is made between general and special appearances except in rare instances where the defendant desires to raise a jurisdictional question and interposes a demurrer or a notice in the nature of a demurrer; such was the practice in *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266).

When a case is at hearing, however, the appearance of counsel for the several parties is noted on the record.

Sec. 92. Dilatory pleas.—The Commission does not look with favor upon nor countenance the pleading of dilatory pleas.³³ If the complaint appears upon its face to be a meritorious cause of action it has not been the policy of the Commission to permit such pleadings as will embarrass the complainant or tend to place obstacles in the way of determining whether or not the allegations be true and constitute a violation of the law. The reason for this doubtless is that if the law is violated and a number of individuals and perhaps commodities are prejudiced the earlier such a state of affairs is rectified the better it will be for all parties concerned.

All questions may be reserved until final hearing:

In *Re Procedure Concerning Questions of Law* (1 I. C. C., 224), where counsel for defendant without notice to complainant moved to dismiss the complaint upon the ground that the matters alleged did not present a violation of the act, the Commission declined to take up the matter, first, because notice to the complainants had not been given, and second, because the object of the motion was to reach the merits of the case, and have them discussed and passed upon summarily instead of at the customary final hearing. "It is the desire of the Commission that the practice and proceedings in all cases shall be in the simplest form possible consistent with justice, and that without dilatory motions, pleas in abatement, or other interlocutory proceedings, the matter in question be brought to an issue at the earliest practicable day, when a final hearing may be had; all proper questions will then be entertained, whether jurisdictional or going to the merits of the controversy."

While the Commission does not favor dilatory pleas, and prefers to reserve all questions either jurisdictional or going to the merits of the controversy for final hearing the Rules of Practice provide for notice in the nature of a demurrer,³⁴ and a formal demurrer has been interposed to a complaint.³⁵

³³ *Re Procedure Concerning Questions of Law* (1 I. C. C., 224).

³⁴ See secs. 106 and 111, *post*.

³⁵ In *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C.,

Rule V of the Rules of Practice (Appendix): "A defendant who deems the petition insufficient to show a breach of legal duty may instead of answering or formally demurring serve on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted."

Sec. 93. Parties.—As in other actions the choice of parties is important. The results⁸⁶ of mis-joinder and non-joinder of parties are not as serious as in law or equity but cause inconvenience and delay.

Sec. 94. Proper description of parties.—The necessity for proper description of parties is manifest. If the complainant be a partnership, the names of the individual partners ought to be given; if a corporation, the laws of the State under which it is incorporated ought to be stated; if one serves as a receiver or in other fiduciary capacity, the complaint should show how he has such authority and also the specific authority to file the complaint; if a voluntary association, that fact should be stated. The business in which the complainant deals and the commodities he handles should be stated.

In the description of parties defendant the complaint should give the correct corporate name of the carrier against which the complaint is filed. The carrier may have "The" as part of its corporate name; it may be a "railroad," or "railway" or "rail-road"; it may or may not be a "company."⁸⁷

In describing the defendants they are generally alleged to be common carriers and corporations organized under the laws of various states⁸⁸ and to be common carriers either by rail or partly by rail and partly by water among the several States and Territories, either naming the States or Territories or describing the locality by some well-known railway designation.⁸⁹

Sec. 95. Parties complainants.—Complainants may be "any common carrier" (sec. 15, as amended); "any person,"⁹⁰ firm, corporation, or

266) a formal demurrer raising the jurisdiction of the Commission over the subject matter was filed; after argument, the demurrer was sustained.

⁸⁶ *Johnston-Larimer D. G. Co. v. W. R. Co.* (12 I. C. C., 52) it was said: "We have considered the advisability of holding the present complaint for the purpose of allowing the complainant to amend it and cite in the additional necessary parties; but there seems to be little in favor of that plan either in the way of expense or convenience. No costs are taxable before the Commission and the complainant can file a new complaint with the same ease that he could amend the present complaint. The testimony already taken can be introduced upon a future hearing for what it is worth, and complications which might arise in proceeding with the present investigation will be avoided by beginning *de novo*."

⁸⁷ In many instances it is difficult to secure the correct corporate names of the carrier. The statistical division of the Commission has the best collected information on the subject; Poor's Manual of Railways is, in general, a safe guide. A list of the correct titles of the principal carriers will be found in the Appendix.

⁸⁸ It is not necessary to allege the States in which the carrier is incorporated; most carriers are incorporated in more than one State; the records of the Commission, in the statistical division, show the States in which the several carriers are incorporated and of these facts the Commission take judicial notice.

⁸⁹ Such as Central Freight Association territory, or Trunk Line territory, or Official Classification territory, etc.

⁹⁰ One may complain on public grounds, though having no personal interest

association," or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization" (sec. 13); or "the railroad commissioner or railroad commission of any State or Territory" (sec. 13).

"No complaint shall be dismissed because of the absence of direct damage to the complainant" (sec. 13).⁴²

An association of merchants, which has no capital and which could not be compelled to pay court costs may complain:

INSTANCE.—In *Forest City Freight Bureau v. A. A. R. Co.* (13 I. C. C., 110) it was held that a concern which admits members upon contract to perform certain services in return for an annual fee is an association competent to be a party complainant; and even if on appeal the court costs could not be recovered from it, such fact does not take away the right to apply to the Commission. And such a complainant may file a complaint for and on behalf of one of its members.

So, also, one who has no real grievance:

INSTANCE.—In *I. C. C. v. D. G. H. & M. R. R. Co.* (57 Fed., 1005), it was held that a complainant before the Commission need have no real grievance because the act expressly so provides; and further, because the Commission has power to institute investigations of its own motion.

Sec. 96. One or more parties on behalf of all interested.—Not infrequently complaints are filed by one who brings the case on behalf of himself and others interested, and he may or may not name them. There is no necessity, however, for filing a complaint with such an allegation, unless the parties be actually and actively interested, for the interests of shippers or communities similarly situated are considered and conserved by the Commission. If relief is granted a complainant at A, others dealing in the same commodity will get the same relief and are permitted, if reparation be awarded, to file their claims and they are allowed, if within the period of limitation.⁴³ So, also, if there is to be a rearrangement of the rate schedule at A and the community B is to be affected by the rearrangement, a proper application of the new rates is made, although B or its merchants are not parties to the proceeding.

There are instances where all defendants are not known to the com-

(*B. & A. R. Co. v. B. & L. R. Co.*, 1 I. C. C., 158). The United States may be a party complainant (*United States v. D. R. Co.*, 1 I. C. C. Docket, 1699).

⁴¹ An association may have no direct interest yet maintain the complaint (*Central Y. P. Assn. v. V. S. & P. R. Co.*, 10 I. C. C., 193; *Am. Warehouseman's Assn. v. I. C. R. Co.*, 7 I. C. C. 556). An association whose laws are in violation of anti-trust laws may nevertheless maintain a complaint (*Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co.*, 7 I. C. C., 513).

⁴² *Milk, etc., Assn. v. D. L. & W. R. Co.* (7 I. C. C., 92), *Boston F. and P. Ex. v. N. Y. & N. E. R. Co.* (4 I. C. C., 664), *B. & A. R. Co. v. B. & L. R. Co.* (1 I. C. C., 158), *Am. Warehouseman's Assn. v. I. C. R. Co.* (7 I. C. C., 556, to compel publication of tariff), *James & Abbot v. C. P. R. Co.* (5 I. C. C., 612), *Central Y. P. Assn. v. V. S. & P. R. Co.* (10 I. C. C. 193). And a druggist may complain of unjust discrimination to him in supplying coal cars (*Thompson v. P. R. Co.*, 10 I. C. C., 640).

⁴³ *Southern P. L. Co. v. S. R. Co.* (14 I. C. C. 195), *Eddelman, etc. v. M. V. R. Co.* (13 I. C. C., 103).

plainant, such as members of classification committees and traffic organizations. There is no reason why the leading members might not be made parties and made defendants on behalf of all. The better practice, however, is to name all members although they may be very numerous.⁴⁴ In a sense, one always complains of one defendant on behalf of others, for as the operating carrier is the proper defendant, it frequently is the lessor of several railroads, each of which is a separate corporate entity.

Sec. 97. Those in fiduciary capacity as parties.—The provisions of the act in general apply to trustees and receivers⁴⁵ of carriers; and a carrier in the hands of a receiver may be made a party defendant even without the consent of the court appointing such receiver;⁴⁶ and where a receiver was appointed for a carrier defendant pending the determination of a petition, it was held that the jurisdiction of the Commission to enter an order was not ousted.⁴⁷

The receiver or other officer is entitled to file a petition for and on behalf of the corporation or partnership which he represents.⁴⁸

Sec. 98. Joinder of complainants—Misjoinder—Striking out parties.—Not infrequently shippers similarly situated and engaged in the same or different lines of trade join in a complaint; or one may sue on behalf of himself and others, who may intervene by appropriate means. An association may sue on behalf of itself and its members.⁴⁹

Should a party be named as complainant and it should thereafter appear that the particular complainant does not wish to continue the prosecution of the case he may withdraw by making a request on the record to that effect; and if a carrier be improperly made a defendant it may by order be relieved from defending the proceeding.

Where one names as defendant a carrier not interested in the traffic which is the subject of investigation, or not practicing the regulations complained of, it is usual for such defendant to answer by way of disclaimer and to pay no further attention to the proceedings. Should the complainant's contentions prevail and there be a violation of the law, an order could not be directed against a carrier which

⁴⁴ In *Acme C. P. Co. v. L. S. & M. S. R. Co.* (I. C. C. Docket, No. 1431) there were 169 defendants. But an omnibus complaint will not be entertained (*National Petroleum Assn. v. A. A. R. Co.* 14 I. C. C., 272). A traffic bureau may maintain a complaint for and on behalf of one of its members. (*Forest City Freight Bureau v. A. A. R. Co.* 13 I. C. C., 118).

⁴⁵ *R. Com. v. Clyde S. S. Co.* (5 I. C. C., 324), *B. of T. v. A. M. R. Co.* (6 I. C. C., 1), *Ind. Ref. Assn. v. W. N. Y. & P. R. Co.* (6 I. C. C. 378). A receiver or trustee is liable under section 10 for violating the act, under section 16 for failure to obey an order made under section 15, under section 20 for violation of the provisions relating to accounts, and under section 1 of the Elkins' law for violation thereof.

⁴⁶ *Evans v. U. P. R. Co.* (6 I. C. C., 520).

⁴⁷ *R. Com. v. Clyde S. S. Co.* (5 I. C. C., 324).

⁴⁸ *Traer, receiver, v. C. P. & St. L. R. Co.* (13 I. C. C., 451).

⁴⁹ *Milk Assn. v. D. L. & W. R. Co.* (7 I. C. C., 92), *Forest City Freight Bureau v. A. A. R. Co.* (13 I. C. C., 118).

neither handled nor proposes to handle the traffic, nor which did not have in force or effect the regulations and practices complained of.

Sec. 99. Parties defendant.—Only common carriers subject to the act are usually made parties defendant.⁶⁰ They are of two kinds: (a) those which are by the act defined to be common carriers, “any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water” and express and sleeping car companies; and (b) common carriers “engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)” in commerce which is interstate, inter-territorial, intra-territorial, or between a State or Territory and the District of Columbia, or from the United States to an adjacent foreign country, or from the United States through a foreign country into the United States; also those engaged in the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry in the United States or adjacent foreign country.

Under the provisions of section 1 of the act parties defendant must fall within one or more of the following classes:

1. Common carriers by pipe line of oil or other commodity, except water and gas, if interstate transportation.

2. Common carriers partly by pipe line and partly by railroad of oil and other commodity, except water and gas, if interstate transportation.

3. Common carriers partly by pipe line and partly by water of oil and other commodity, except water and gas, if interstate transportation.

4. Common carriers of passengers or property wholly by railroad if the transportation be (a) interstate; intra-territorial; inter-territorial; or between a Territory or State and the District of Columbia, (b) From the United States to an adjacent foreign country, (c) From the United States through a foreign country to any other place in the United States.

5. Common carriers of passengers and property partly by railroad and partly by water when both are used under a common control, man-

⁶⁰ In appropriate cases for the enforcement of the statutes relating to interstate commerce it is lawful under the provisions of section 2 of the Elkins law (Act of Feb. 19, 1903) to include as parties in addition to the carrier all persons interested in or affected by the rate, regulation, or practice under consideration.

agement or arrangement for continuous carriage or shipment, if the transportation be of one of the kinds mentioned in sub-heads of paragraph 4.

6. Common carriers engaged in the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry in the United States or adjacent foreign country.

7. Express companies, if engaged in the kind of transportation mentioned in paragraph 4.

8. Sleeping car companies, if engaged in the kind of transportation mentioned in paragraph 4.

Handlers of certain transportation are subject to the act, being by the act included within the term "railroad" or "transportation." Section 1 provides:

The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

Under the provisions of section 2 of the Elkins' law it is permitted to make all persons interested in or affected by the rate, regulation, or practice under consideration parties to a proceeding before the Commission or before the courts. Under this provision a grain elevator company was recently with carriers of interstate commerce made a party defendant (I. C. C. Docket No. 1821).

In determining whether a particular carrier is one which can or ought to be made a party defendant, the question is often a difficult one, for the reason that the line between interstate and intrastate traffic has not been clearly drawn. In particular instances where there is doubt in the mind of the pleader whether a carrier is subject to the act, or ought or might be made a defendant, it is justifiable to resolve the doubt in the affirmative in the first instance. If a carrier is a necessary party and be omitted, no order can be made; if an unnecessary

party, and it be made a defendant no harm results to either it or the complainant.

All carriers making a connecting line over which the rate applies should be made parties, and the Commission will make no order where proper parties are not before it:

INSTANCE.—In *Michigan Congress-Water Co. v. C. & G. T. R. Co.* (2 I. C. C., 594), it was held that it is necessary to make all connecting lines parties in attacking a through rate in which the several lines participated. In disposing of this point the Commission said: "We have repeatedly decided that we can make no order on a question of rates where the necessary parties are not before us. In *Allen v. L. N. A. & C. R. Co.* (1 I. C. C., 199) we held that all the roads constituting the line which makes the through rates complained of should be parties to the complaint which seeks to compel a reduction of the through rates. Again in the case of *Harwell v. C. & W. R. Co.* (1 I. C. C., 237) we held that the parties affected are entitled to be notified in case a change in rates is asked; and that we would not make an order correcting an alleged unjust discrimination, unless the proper parties were before us. And again in the case of *Riddle Dean & Co. v. P. & L. E. R. Co.* (1 I. C. C., 490) we decided that where the relation of any carrier to the matter complained of is such that it is in whole or in part materially responsible for the alleged grievance, and has a direct interest in any investigation of the subject-matter involved, that carrier should be a party to the proceeding, and if not a party no relief can be given against it. The rule as to proper parties in such a proceeding as this is plain, simple, and elementary. There is no difficulty in observing it, and especially where, as in this proceeding, the defense set up in the answer shows that all the necessary parties had not been made defendants. This put the complainant upon an inquiry which it should at once have made, and amended its complaint to correspond with the facts unless it was prepared to prove that this averment of the answer was untrue."

It is unnecessary to name all carriers maintaining the same rate or practice, but only those whose facilities are used by the complainant:

INSTANCE.—In *Page v. D. L. & W. R. Co.* (6 I. C. C., 548) it was held that in proceedings before the Commission complainants are not bound to name as defendants all carriers maintaining the rates or indulging in the practice complained of but there may be proceedings against the particular carrier or carriers whose lines are used or required by the complainant. It was further held that such carriers made defendants could not excuse disobedience of a lawful order of the Commission because other carriers, members of an association with them, had not been made parties to the proceeding and had failed or refused to take action in conformity with the order.

Carriers handling traffic from a point of origin to a basing point are not necessary parties when the rates beyond the basing point only are involved:

INSTANCE.—In *Daniels v. G. N. R. Co.* (6 I. C. C., 458) it was held that as through traffic from the Atlantic seaboard to Sioux City and Sioux Falls is subjected to the same charges for the haul from Chicago or Duluth, as traffic shipped locally from those places to either destination, as rates from eastern points to Chicago and Duluth do not, in any controlling degree, effect the present controversy, and are not assailed by the complainant, it was unnecessary to make the eastern carriers parties to the proceeding.

Water carriers engaged under a common control, management or arrangement for a continuous carriage or shipment of interstate freight are properly made defendants:

INSTANCE.—In *R. Com. v. S. F. & W. R. Co.* (5 I. C. C., 136) certain steamship companies were made defendants, it being alleged that they with certain rail defendants were common carriers, constituting several lines, and as such are engaged under the common control, management or arrangement for continuous carriage of shipments, in the transportation of passengers and property “wholly by railroad and partly by railroad and partly by water between various points in the State of Florida.” * * * and Baltimore, Philadelphia and New York, and, by connecting lines, to other eastern cities. It appeared that the Clyde Steamship Company and the New York and Texas Steamship Company constituting all-water lines, and engaged in connection with the railroads, in the transportation of oranges from points in Florida to northeastern cities under through bills of lading. It was held affirming previous decisions (*C. of C. v. F. & P. M. R. Co.*, 2 I. C. C., 553; *Mattingly v. P. Co.*, 3 I. C. C. 592) that these water companies were carriers of interstate commerce subject to the jurisdiction of the Commission in respect thereto and properly made parties.

Receivers of rail carriers are proper parties and leave of court to complain of them is not required:

INSTANCE.—In *Evans v. U. P. R. Co.* (6 I. C. C., 520) it was held that leave of court to make the receiver of a railroad company defendant was not necessary. Receivers of railroad companies are common carriers subject to the act to regulate commerce. (*Independent Refiners' Asso. v. W. N. Y. & P. R. Co.*, 6 I. C. C., 378.)

In a petition under the fourth section of the act all carriers forming the through line should be made parties:

INSTANCE.—In *B. & A. R. Co. v. B. & L. R. Co.* (1 I. C. C., 158) it was held that all companies forming a line for long haul traffic are properly made defendants in a petition charging violation of the fourth section of the act.

A classification committee of carriers is not properly made a party to a proceeding before the Commission:

INSTANCE.—In *McMillan & Co. v. Western Classification Committee* (4 I. C. C., 276) it appearing that the Western Classification Committee, the sole defendant, in the making of classification rates represented numerous railroad companies and that its recommendations and rates were not obligatory upon the carriers, it was held that with the classification committee alone as defendants no investigation or order that the Commission could make would have any binding effect upon the carriers.

In proceedings to change a classification all carriers over which the commodity passes should be made parties:

INSTANCE.—In *Hurlburt v. L. S. & M. S. R. Co.* (2 I. C. C., 122) it was held that in a proceeding to correct the classification of freight made by an initial carrier, which freight before reaching its destination must pass over the roads of several carriers, it is proper to make all such carriers parties. But if the initial carrier alone is made defendant the proceeding is for that reason not defective, for an order requiring that carrier to make a correction will be effectual for the purpose of all subsequent consignments.

Where carriers or localities have a right to appear and be heard and are not made parties, the Commission will make no order:

INSTANCE.—In *Poughkeepsie Iron Co. v. N. Y. C. & H. R. R. Co.* (4 I. C. C., 195) where a change of rates in order to overcome the difference in cost of production of a particular commodity was sought, it was held that the Commission had no power and authority to order carriers not parties to a proceeding to raise their rates for the purposes sought; and further that the Commission would not enter upon the consideration of any such subject in a proceeding to which such carriers were not parties and in which localities sought to be burdened with higher rates had no opportunity to be heard.

An intermediate carrier may not be a necessary but is a proper party to a proceeding:

INSTANCE.—In *Warren-Ehret v. C. R. Co.* (8 I. C. C., 598) it was held that where a company operates its road as part of a through line in connection with other parties defendant in a case brought to test the legality of a through charge over such line, while a proper is not a necessary party to the proceeding.

Those excluded from the provisions of the law and hence not subject to the jurisdiction of the Commission and incapable of being made parties are those who are engaged in the interstate transportation of passengers or property by other means than stated, or in the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory (proviso, section 1): and those engaged as provided in section 1 of the act if not common carriers either by charter or by holding themselves out as such; also carriers wholly by water,⁵¹ and independent water carriers engaged in transportation of trans-Atlantic or trans-Pacific commerce.⁵² All inter state carriers are not subject to the act—e. g., carriers by wagon. Any carrier or person whether or not subject to the act by being specified may be made a defendant, if he be “interested in or affected by the rate, regulation or practice under consideration” (Elkins law, section 2).

In selecting parties defendant one must sue all operating carriers forming the route and which handle the particular traffic the subject of complaint. To make the initial or intermediate or final carrier defendant will cause delay, as amendment will be necessary. If it be desired to attack the rates between competing points, and there are

⁵¹ *Ex parte Koehler* (30 Fed., 867). While the act applies to common carriers engaged in certain transportation partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment, and while receiving goods as a part of a continuous line under a through bill of lading, the carrier has elected to handle interstate commerce (*C. N. O. & T. P. R. Co. v. I. C. C.*, 162 U. S., 184), yet it would appear that a through bill of lading providing for trans-Atlantic or trans-Pacific carriage does not bring the ocean carrier within the jurisdiction of the Commission (*Cosmopolitan Shipping Line v. Hamburg-American Packet Co.*, 13 I. C. C., 266). As to extra-territorial effect of United States Statutes see *Wiborg v. U. S.* (163 U. S. 632), *U. S. v. Morris* (14 Pet., 464).

⁵² *T. & P. R. Co. v. I. C. C.* (162 U. S., 197), Administrative Ruling No. 86 (Appendix); *Cosmopolitan Shipping Line v. Hamburg-American Packet Co.* (13 I. C. C., 266).

several routes, it is advisable to make defendants all carriers operating lines between the two centers.

While custom requires that the operating carriers be made parties defendant yet where a controlling company was made a party defendant respecting traffic handled by a subsidiary company and service of the complaint was had on the former, it was held that while the subsidiary company is a proper, it is not a necessary party.⁵³

Sec. 100. Those who must be joined as defendants.—All operating carriers handling the traffic, the subject of the complaint, are necessary parties defendant; the originating, intermediate and final carriers must be named. Should one wish to attack the rates between A and B, and the commodity be handled by three carriers, each must be made defendant. If these points are connected by more than one route, the operating carriers composing the several routes should be made parties. So, also, if one seek to secure a through route, all operating carriers who are to compose the proposed routes, must be joined; likewise, if there is an alleged violation of section 7, relating to continuous carriage.

If the proceeding is to secure a correction of alleged unreasonable regulations and practices, and such regulations and practices are local or made and enforced by one carrier, it is not necessary to join others; so, also, if the proceeding be for failure to file and post tariffs and schedules, or to compel issuance of bill of lading or failure to make switch connections. But if a practice be common to several carriers, and one only be made defendant, the Commission will not condemn the practice, as all carriers have a right to be heard.⁵⁴

Sec. 101. Effect of failure to object to proper parties.—Owing to the liberality of the statute and the Commission concerning who may be proper parties complainant, it will avail nothing under ordinary circumstances to object to the capacity of the complainant to institute a proceeding. The defendant may raise the lack of personal interest which the complainant has in the proceeding but if the allegations of violation of the law are meritorious the want of interest in the plaintiff will be of no value in excusing or avoiding the violation.

Where necessary parties defendant are not made such, it will not behoove other defendants to raise the question because the Commission can make no order effective as against a part of the defendants when all of them handle or are interested in the particular tariff which is the subject of inquiry.⁵⁵ If a carrier be improperly made a defendant the proceedings as to it will be dismissed.⁵⁶

⁵³ Mayor & Council of W. v. A. T. & S. F. R. Co. (9 I. C. C., 534).

⁵⁴ Commercial Club v. N. P. R. Co. (13 I. C. C., 288).

⁵⁵ Johnston-Larimer D. G. Co. v. W. R. Co. (12 I. C. C., 52).

⁵⁶ Pitts v. A. T. & S. F. R. Co. (10 I. C. C., 691), where two of the carriers made parties defendant did not handle the traffic in question, the proceeding as to them was dismissed.

No order will be made where proper parties are not before the Commission :

INSTANCE.—In *Board of Trade v. C. & W. R. Co.* (1 I. C. C., 236) no order could be made correcting unjust discrimination because of want of proper parties and distinct allegations but amendments both as to parties and allegations were allowed.

In *K. & I. B. Co. v. L. & N. R. Co.* (2 I. C. C., 162) the Commission declined to express an opinion upon the reasonableness of rates where two carriers were involved and only one of them a party; so also in *New Orleans C. Ex. v. C. N. O. & T. P. R. Co.* (2 I. C. C., 375) the Commission said that the reasonableness of rates could not be fairly determined in a proceeding to which some of the carriers responsible for such rates are not parties.

But the proceeding may be held for amendment as to parties and taking additional evidence:

INSTANCE.—In *Rice v. L. & N. R. Co.* (1 I. C. C., 503) the Commission held that where an important question was raised by the pleadings in the case and that a determination of it would effect others quite as much as the parties to the proceedings the Commission would decline to decide the question and leave the parties to bring it forward again as they might be advised.

In *Bates v. P. R. Co.* (3 I. C. C., 435) an order was issued against respondents of record but as other carriers had committed similar violations of the act the cause was held for the purpose of making other carriers parties unless they should comply with the order.

In *Hamilton & Brown v. C. R. & C. R. Co.* (4 I. C. C., 686) all carriers participating in the traffic, the rates for which were questioned, had not been made parties and upon the showing that the through rates were discriminatory and unjust, the carriers, parties to the proceeding, were required to adjust their tariffs so as to avoid discrimination; and the carriers who were not parties should be summoned and show cause why a like order should not issue as against them unless their tariffs should be voluntarily adjusted in accordance with the order.

In *Spartanburg B. of T. v. R. & D. R. Co.* (2 I. C. C., 304) where it was obvious that there were many parties interested as directly as the complainant in the pending question it was held that opportunity would be given them to appear at the taking of evidence.

Sec. 102. New parties.—New parties complainant may be brought in by intervention, amendment or by substitution of receiver, trustee, etc., each in similarity to the practice in the Federal courts. After new parties have been joined in any manner the proceeding continues in the same way as if there had been no change.

Amendment of pleadings will be permitted to bring in receivers, succeeding those made parties:

INSTANCE.—In *Reynolds v. W. N. Y. & P. R. Co.* (1 I. C. C., 347) the receiver of a carrier defendant was made a party but in the complaint the receiver was erroneously called the president, and the petition was served on him, and answer filed; it was held that it was proper to allow the petitioner to amend his complaint so as to show the existence of the receivership.

Notice of hearing may be published that the public may appear and be heard:

INSTANCE.—In *Re C. St. P. & K. C. R. Co.* (2 I. C. C., 231) it was ordered

that a notice be published of the proposed hearing that carriers and the public generally might have an opportunity to attend and be heard.

Sec. 103. Intervention.—Intervention by parties, alleging that they are interested in the result is permitted upon filing a petition⁵⁷ therefor; such a petition should set forth the interest of the intervener, and as well as the position which he proposes to take in the pending controversy. As is customary in Federal courts the intervener may assert a right antagonistic to both of the parties, or only against one of them; ⁵⁸ interveners may also take the position that the relief sought by the complainant is not warranted, but that if any relief is to be granted they desire the same relief given them.⁵⁹

Orders permitting intervention are usually granted as a matter of course. An intervener is permitted to examine witnesses, adduce testimony, and be heard in argument.

Interveners become substantially parties to the proceeding and are entitled to all the rights of parties, except a copy of the testimony, and are subject to the liabilities of complainants or defendants. In an appropriate case relief may be granted in favor of interveners seeking the same relief as complainants, and probably as against interveners setting up a defense, where the questions have been properly raised.

After intervention the case proceeds in all respects as if there had been no intervention.

Upon answer that the consent of other carriers is required to a change of rates, they may be made parties by compulsory intervention:

INSTANCE.—In *Eau Claire B. of T. v. C. M. & St. P. R. Co.* (5 I. C. C., 264) the complaint was directed against one carrier and the answer pleaded its inability to alter the rates complained of without consent, hitherto withheld, of other carriers named therein; and it was prayed that the named roads should be made parties to the proceedings. The roads were made parties, and one carrier on its own application was permitted to intervene; in the same case there were numerous interveners, being the users of transportation facilities, who sought to sustain and defend the rates assailed in the proceeding.

While one may not be a party complainant or have intervened yet if he appears at a hearing opportunity will be given him to be heard,⁶⁰ and this is particularly true in general investigations; the rule ap-

⁵⁷ If the circumstances be such that an intervening petition can not be filed, a motion asking for permission to file an intervening petition at a later date may be granted.

⁵⁸ As an illustration of intervention by those proposing to assist complainants, see *Western Oregon Lumber Mfrs. Assn. v. S. P. Co.* (14 I. C. C., 61).

As an example of intervention on the part of defendant see *Royal C. & C. Co. v. S. R. Co.* (13 I. C. C., 440).

⁵⁹ As intervening petitions of Shreveport Traffic Association and Alexandria Progressive League in *Monroe Progressive League v. V. S. & P. R. Co.* (I. C. C. Docket No. 1388).

⁶⁰ *Hurlburt v. L. S. & M. S. R. Co.* (2 I. C. C., 122).

plies equally to parties desiring to be heard on behalf of the complainant or defendant, or on public grounds.⁸¹

Sec. 104. Time for answer—Extension of time for answer.—The usual rule respecting time when answer must be filed is twenty days after service of the complaint; in special cases and for good cause shown this time is not infrequently reduced, or extended.

Where upon good cause shown the carrier can not reasonably, answer within the time specified in the order, and a brief delay will not prejudice the interest of parties, the Commission, upon application, usually extends the time; such extension is not ordinarily more than ten days beyond the time first fixed, except in extraordinary cases.

Sec. 105. The answer.—The answer, which may be by way of disclaimer or traverse or confession and avoidance, is analogous to an answer in an equity proceeding. None of the technicalities or formal parts is required and are not generally permitted. The answer does not, in any event, ask for affirmative relief against the complainant, but only asks one relief, namely, that the complaint be dismissed.

Sec. 106. Notice in the nature of demurrer.—Where a party defendant deems the petition insufficient to show a breach of legal duty it may, instead of answering or formally demurring, serve on the complainant a notice of hearing of the petition; in such case the facts stated in the petition will be deemed admitted.⁸² Such a notice may be filed to raise a jurisdictional question or to raise the question whether or not the act of the defendant constitutes a violation of the provisions of the act, or to show the want of necessarily formal allegations in the petition. But such a notice, however, is not usually filed where the complaint alleges a violation of the first or third sections of the act, for the reason that in such cases there must be determined whether or not the rate be “unjust or unreasonable,” or the prejudice “undue.” It is clear that if such a notice be filed to complaints of the character mentioned the Commission would be without information either from the complainant or defendant whereon it could base a decision that the rate or practice of the carrier is of such nature as to fall beyond the prohibition respecting “unjust and unreasonable” rates or “undue” discrimination. The use of such a notice in cases involving rights based upon facts sufficiently pleaded and where no evidence is required to show the effect of the facts expedites the determination of cases.⁸³

Sec. 107. Pleading different defenses.—While pleading inconsistent

⁸¹ At one of the hearings in *Re Differential Rates* (11 I. C. C. 13) a witness, who represented himself as a “publicist,” appeared and was permitted to file a statement giving his views of the matter.

⁸² See Rule V of the Rules of Practice, Appendix.

⁸³ For example of notice in the nature of demurrer see *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. C., 266).

defenses will ordinarily constitute bad pleading and therefore should not be done, yet there are instances where different defenses may be set up in the answer to a complaint before the Commission. One is permitted to allege as many grounds of defense as he may have, not being confined to any one matter of defense, but the disadvantages of inconsistent defenses, are so manifest that one will not ordinarily avail himself of the privilege. Those familiar with transportation facts and circumstances will appreciate that often defenses are apparently inconsistent when in truth they are not.

The answer generally concedes, although it may deny, the right of the complainant to sue. It admits ordinarily that the defendant is subject to the act to regulate commerce and the acts amendatory thereto and to all *lawful* orders of the Commission. In an appropriate case, however, the carrier may deny that it is subject to the provisions of the act and to the orders of the Commission. Such denial of jurisdiction may or may not be determined separately from the issues formed in the case. If the denial of jurisdiction be in the nature of a demurrer the law point is alone determined; if determined against the jurisdiction the case terminates; if determined in favor of the jurisdiction, and the carrier has not answered as to the facts, opportunity is given to answer.⁴⁴

The answer either sets up a denial or an admission of the facts alleged or alleges facts in addition to those in the complaint and which, in the judgment of the defendant, excuses the alleged violation of the law. In any event, if the defendant proposes to contest the matter the answer denies the alleged violation of law.

Where the complaint has allegations in the nature of a confederacy clause stating that the existing rate, practice or regulation is maintained and enforced in violation of the Sherman antitrust law, it is usual for the carrier to deny any violation thereof.

By answering on the merits a defendant is not precluded⁴⁴ from thereafter raising questions of jurisdiction or the insufficiency of the petition; the answer, although silent upon the right of the Commission to determine the matters alleged or upon the sufficiency of the allegations of the petition does not preclude the defendant from thereafter raising the questions, although it might properly have filed instead of its answer a notice in the nature of demurrer. The failure to file such a notice does not estop the defendant from thereafter raising the same questions, for at the hearing it may make a motion to dismiss the petition for insufficiency.

Where a defendant has failed to answer the complaint, it is provided by Rule X of the Rules of Practice, that "the Commission will take such proof of the facts as may be deemed proper and reasonable,

⁴⁴ Rule of Practice No. V (Appendix).

and make such order thereon as the circumstances of the case appear to require.”

Sec. 108. Effect of answer to part only of petition.—Where through error or inadvertence the answer is not a complete answer to the allegations of the complaint the defendant is not ordinarily restricted to those matters which it has alleged in its pleading. It may give evidence upon matters of fact not contained in the pleading provided it is relevant to the subject of controversy. The failure to make such allegations as should have been made does not exclude the defendant from thereafter setting up new or additional defenses. As the complainant is not restricted to the matters which he alleges in the complaint in adducing testimony, so the defendant is not restricted concerning the scope of the evidence which it may give at the hearing. Neither of the parties is estopped to give evidence tending to show or excuse or justify the violation of the act if germane to the allegations of the complaint or answer.

Thus if one should allege a certain rate to be relatively unreasonable and in violation of section 3 he is ordinarily permitted to give evidence tending to show that the rate is unreasonable *per se*; also the complainant is permitted to give evidence upon matters which arise after the complaint is filed and before hearing. And, if a defendant attempt to justify a rate because of increased operating expenses, it would be permitted to show that the value of the service is as much or more than the present rate; so, also, where the answer justifies the regulation of practice because of one reason, evidence may be given on additional reasons whether these reasons existed at the time of answer or arose subsequent thereto.

Sec. 109. Service of answer.—The answer of the defendant is served by it on the complainant or his attorney by mail. The complainant or attorney should acknowledge the receipt of the answer, both to the carrier and to the Commission.

Sec. 110. Disclaimer.—Where a defendant does not handle the traffic or it is not proposed that it shall handle the traffic, or it does not have in force and effect the regulations or practices complained of, it may disclaim by way of answer. And, if the disclaimer be true, the complainant ordinarily waives his right against the particular defendant at the hearing.

Sec. 111. Issues—Replication—Joinders of issue.—The issues in a case before the Commission are made by the complaint and answer. There is no replication or joinder of issue or pleading subsequent to answer, except by intervening petitioners. It follows that under the system in use there can be no departure.

The Rules of Practice make no provision for filing a replication; if the state of the pleadings should be such that the complainant

wishes to reply to matters set up in the answer, he is under the necessity of doing so either by adducing evidence at the hearing or, if the liberality of the rules of evidence allowed by the Commission will not avail him, of amending his complaint.

Replications are unknown in the practice before the Commission and leave asked for that purpose was denied:

INSTANCE.—In *O. S. L. R. Co. v. N. P. R. Co.* (3 I. C. C., 264) the complainant, after answer, asked leave to file a replication. Holding that a replication could not be filed the Commission said: "The Rules of Practice in this Commission not only do not provide for a replication to the answer, but in effect, though not in terms, exclude it. Rule IV provides for an answer, unless the respondent sets the case for hearing on the complaint under Rule V, which provides as follows: 'If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on complaint.' But when an answer is filed the Rules contemplate that the issue is thereby *joined*. The language of Rule XI is this: 'Upon issue being joined by the service of answer, the Commission will assign a time and place for hearing the same.' And, again, in XII: 'When a cause is at issue on petition and answer, each party may proceed at once to take depositions,' etc. The omission to provide for a replication to the answer was not an oversight when the Rules of Practice were drafted and adopted. The view of the Commission then was to simplify the practice as much as practicable. Experience since has not developed any necessity for change in the respect under consideration. Both the letter and the spirit of the statute excludes the idea of technicality in its administration. The complaint and answer are sufficient to indicate the substantial controversy. Evidence is admitted with liberality to develop all facts that bear on the issue thus made. Under the practice pursued in the hearing of causes the complainant would gain nothing by filing a replication, and would lose nothing by not filing it. The complainant has leave to withdraw his motion to file a replication."

Sec. 112. Exceptions to answer.—The equity practice of filing exceptions to answers is not at all common although the answers may set up irrelevant and immaterial matter. In one instance⁶⁵ exceptions to answers were filed on the ground that the answers were scandalous and impertinent. The exceptions were heard and argued at the hearing and upon suggestions from the bench the defendants against whose answers the exceptions were filed withdrew their answers and adopted the answer of another carrier.

Sec. 113. Joint answers.—The filing of joint answers by two or more defendants is permitted in the practice before the Commission. Not infrequently the facts of the case are such that a joint answer is advantageous; so, also, when several defendants are represented by the same traffic manager or there is a community of interest between two or more carriers parties defendant.

Where two or more carriers desire to file a joint answer as to a number of matters alleged in the petition and one of them desires to

⁶⁵ *National Hay Assn. v. L. S. & M. S. R. Co.*, Chicago Hearing (9 I. C. C., 264).

separately set up a defense not common to all the defendants a joint answer may be filed by the several defendants and in it the particular carrier may answer specially concerning the matter of the defense it desires to set up.

Sec. 114. Hearings.—When an answer has been filed with the Commission and served upon a complainant (whose duty it is to acknowledge receipt thereof to the Commission), either party may by letter or by use of Form No. 4 (Appendix) request that the hearing be set for a specific time and at a particular place. When the time for answer has elapsed a hearing may be set although no answer has been filed. Hearings may be held in any part of the United States, as the convenience of the Commission and parties will permit. The time ordinarily requested for hearing is such that the parties may be given at least ten days notice of the date and place.

Should a hearing not be requested, one or both of the parties may for reasons peculiar to the case ask that the time of hearing be delayed; the reasons for delay ought to be cogent, otherwise the hearing will be set for such time and place as the Commission is able.

Should the complainant or defendant not request a date for hearing the Commission will fix the time and place of hearing on its own motion, for it is desired that cases be promptly disposed of.

Rule X of the Rules of Practice (Appendix) provide for the assignment of cases for hearing, method of taking testimony, and burden of proof.

The day for hearing will be assigned upon the request of either party (*Re Procedure in Cases at Issue*, 1 I. C. C., 223).

Hearings, when once arranged for, will not be changed except for very cogent reasons. Want of preparation or engagements of counsel where there is more than one are not in general sufficient causes for postponement of hearing; and a hearing will not be delayed upon a purely technical objection not reaching the merits of the controversy.⁶⁶ Counsel and parties are expected to appreciate the many engagements of the Commission and the examiners and to be prepared to attend the hearings and present their case.

Sec. 115. Briefs.—Cases may be submitted on briefs and, if the parties desire it the importance of the case and the convenience of the Commission will permit, oral argument may be had.

The Rules of Practice (Rule XIV, Appendix), make provision for the contents, service, printing,⁶⁷ and filing of briefs. The rules provide that the briefs shall contain an abstract of the evidence relied upon by each of the parties with references to the pages of the testi-

⁶⁶ *Benton T. Co. v. B. H. St. J. R. & L. Co.* (13 I. C. C., 542).

⁶⁷ Briefs shall be printed in 12-point type, on antique finish paper, 5 7-8 inches wide by 9 inches long, with suitable margins, double-leaded text and single-leaded citations.

mony, substantiating the facts. The brief of the complainant is required to be filed with the Commission and served upon the adverse party within fifteen days after the testimony has been concluded; brief of defendant is due within ten days thereafter, and reply brief of complainant is due five days after service of defendant's brief on him. The time within which briefs and reply briefs are to be filed may be shortened or extended as the circumstances require.

If the case is to be argued it is provided that briefs shall be filed and served at least five days before the oral argument.

Briefs are served by mail and the counsel on whom a brief is served will acknowledge its receipt promptly, both to the counsel transmitting it and also to the Commission.

The filing of briefs may, by consent of the parties, be dispensed with for the case may be rested upon the testimony. If there be great doubt of the facts or serious conflict of evidence, or if complicated questions of law are involved, briefs ought to be filed.

The statute requires in case damages are awarded that a report of the Commission shall include the findings of fact on which the award is made (sec. 14). It is customary in such cases to make the suggested findings of fact a part of the brief. The findings of a particular fact or set of facts is often requisite in order that damages may be awarded; naturally the proposed findings of fact must be properly substantiated by the evidence adduced at the hearing.

As the complainant may seek either relief, or relief with damages, his brief and as well as the brief of the defendant, may be of one or two kinds. If relief only is sought, the brief, in addition to the title of the case, will contain (a) a statement of the case, (b) argument, (c) the conclusions; if the complainant seeks relief and damages, the brief may properly contain as a separate head the suggested findings of fact, serially numbered, whereon it is asked that the Commission award reparation; the brief of the defendant may or may not, according as the circumstances of the case warrant, admit the truthfulness of the suggested findings of fact.

In preparing the statement of the case it is well to follow the rule laid down by the Supreme Court, that it shall be "a concise abstract, or statement of the case presenting succinctly the questions involved."

In making the legal argument⁸⁸ in the brief the practitioner will appreciate that the decisions of the Supreme Court of the United States, of the Federal circuit and district courts, and of the Commission itself, will take precedence, where the precise point has been decided,

⁸⁸ It not infrequently happens that recourse is had to the decisions of English courts in construing and applying the act. Some parts of the act have not as yet been considered by either the Commission or the courts and where the language is similar to the English statute, it is proper to refer to the decisions of the English tribunals. As an illustration, see the brief of defendant's counsel in *Traer, receiver, v. I. C. R. Co.* (13 I. C. C., 451).

over decisions of State courts, State railway commissions or an English court.

While the argument to be included in the brief is left to the discretion of counsel, as well as the language which shall be used, yet it should be recalled that "briefs should be respectful to the court, the parties, and all persons named in them."⁶⁰

Sec. 116. Argument.—Where the questions involved in a proceeding, either of fact or of law, are, in the minds of the contesting parties, of sufficient importance that in addition to the filing of briefs there should be oral argument, the Commission usually grants it upon request. The date of argument is fixed by the Commission as will best suit its convenience and that of the parties; arguments are usually heard at Washington, unless, upon request for another place, it will suit the convenience of the Commission to name such place. At the argument⁷⁰ one or more of the Commissioners may sit; if one only, then that one to whom has been assigned the case in accordance with the custom prevailing (see sec. 4).

Where the facts are not seriously disputed and the questions of law are not complex, or for other good reasons, argument may be had at the conclusion of the hearing.

The time allotted to the several parties for argument varies with the importance of the case; usually at least one hour is given to each of the parties, the customary rules concerning the right to open and close prevailing; if there be interveners they are usually permitted time for argument, the duration depending upon the importance of their interest; but if the position of an intervener is directly in record with a complainant or a defendant, separate time for argument by the intervener may not be permitted.

Sec. 117. Copies of testimony.—One copy of the testimony is furnished to the principal complainant and one copy to the principal defendant without cost. Others who desire copies can obtain them by paying therefor from the stenographers under contract with the Commission.⁷¹

Sec. 118. Motions.—In the course of a proceeding there are frequently occasions when motions of various kinds are necessary. These

⁶⁰ *Smith v. Bingham* (3 Ill. App., 65). Some practitioners before the Commission are fond of writing sarcastic briefs, speaking slightly and with disrespect of witnesses. Such practice is not to be commended, for in addition to such unwarranted displays of spleen the practitioner generally prejudices his case. Probably in an aggravated case a motion to strike such briefs from the files would be granted.

⁷⁰ In addressing the Commission, or one of the Commissioners, the custom is not uniform. Some use the term "Your honor," or "Your honors"; others say "Mr. Commissioner," or "Judge." In speaking individually to the members of the Commission, some of them prefer the titles by which they have a right to be called by reason of previous service.

⁷¹ The present contractors are Hulse & Allen, 67 Wall street, New York; Century Building, Washington, D. C., Scarritt Building, Kansas City, Mo.

motions are usually to permit intervention, for leave to dismiss, for leave to amend, and such other motions as during the progress of the case may be deemed advisable. A motion is ordinarily granted as a matter of course, but where rights are to be affected there may be argument whether it should be granted.

Sec. 119. Costs.—Counsel fees.—There are no costs chargeable by the Commission.⁷² Parties are, however, compelled to pay witnesses the same fees and mileage as is now provided by law for the Federal courts.

The provisions of section 8 of the act applying only to the courts⁷³ do not permit the Commission to award counsel or attorney's fees.

Sec. 120. Practice in reparation cases.—It is clear that where a complainant seeks an award of reparation, either for himself or for others, the complaint should contain sufficient allegations and of such precise nature as will support a prayer for damages. A complaint may seek reparation for any of the violations of the act by reason of which the complainant has been damnified; the more usual cases asking reparation involve the question of unreasonable rates, either *per se* or relatively and on account of undue discrimination, chiefly in the furnishing of cars; not infrequently complaints, both formal and informal, seek reparation on account of misrouting, clerical errors in computation, and misapplication of a rate.

Where the complaint seeking reparation is based upon an unreasonable rate it ought not only to allege the facts necessary to support a complaint whereon shall be determined what the reasonable rate is, but also an *ad damnum* clause, with a bill of particulars specifying shipments which have been made at the alleged unreasonable rate; if shipments shall continue to be made during the pendency of the hearing or until the rate shall have been changed, supplemental bills of particulars may be filed in order that the statute of limitations may not run. The measure of damages in reparation cases involving the reasonableness of a rate is computed by the difference between the rate charged and the rate found to be reasonable;⁷⁴ the time from which reparation shall start is in the discretion of the Commission.⁷⁵

Reparation may be awarded to those who are the real and substantial parties in interest, and is generally to the person who has been required to pay the freight charges:

INSTANCE.—In *Nicola, Stone & Myers Co. v. L. & N. R. Co.* (14 I. C. C., 199): "At the hearing of the oral argument in these cases counsel for certain

⁷² *Merchants Assn. v. N. Y. N. H. & H. R. Co.* (13 I. C. C., 225).

⁷³ *Council v. W. & A. R. Co.* (1 I. C. C., 339).

⁷⁴ *Holmes & Co. v. S. R. Co.* (8 I. C. C., 561). The unreasonable rate must be based upon evidence and a finding that it was unreasonable at the time it was paid (*Grain Shippers' Assn. v. I. C. R. Co.*, 8 I. C. C., 158).

⁷⁵ *Burgess v. Transcontinental Freight Bureau* (13 I. C. C., 668).

mill men and manufacturers of lumber in Georgia appeared and represented to the Commission that they were, by intervention proceedings in the United States Circuit Court for the Southern District of Georgia, setting up claims for reparation in cases pending in said court and involving reparation on shipments between points of origin and destination embraced in the orders referred to in opposition to the claims of shippers of such lumber, on the ground that in the general course of the lumber business the lumber is ordinarily sold by the manufacturer or mill man, f. o. b. cars at the mill, at prices taking into account the amount of the freight which must be paid for transportation from that point to destination; that the purchaser to whom it is consigned adds the amount of the freight to the price of the lumber when he disposes of it, and that the party really injured and damaged by the establishment and exaction of the unreasonable rate is the manufacturer or the mill man, the price of whose commodity has been unfavorably affected by such rate. In other words it is contended that the manufacturer has had to absorb the freight rate in the selling price of his lumber. On the other hand, it is contended by the carriers that both the manufacturer or mill man and the broker or dealer to whom he ordinarily sells the lumber protect themselves against the injury caused by the excessive amount of the rate by adding it to the price of the lumber, thus imposing the burden or injury upon the consumer, and that if any one of the parties is entitled to a refund it is the latter.

“The three classes of persons concerned in this matter of refund are:

“1. The carriers, who are simply the trustees or stakeholders of the fund and whose duty it is to pay it over to the person adjudged to be entitled thereto on the order of a tribunal of competent jurisdiction.

“2. The vendor of the lumber, who may be variously designated as the manufacturer, shipper, mill man, consignor, etc.

“3. The vendee of the lumber, who may be variously designated as wholesaler, retailer, broker, consignee, consumer, etc.

“The suggestion of these manufacturers or mill men, through their counsel, so far as it applies to claims pending before the Commission, would, if followed, lead the Commission away from the direct results of the act of the carrier in the establishment and exaction of an unjust rate into the domain of indirect and remote consequences and perhaps into questions of equity between the vendor and vendee of the lumber. The vendor sells the lumber for the best price he can get, and the vendee buys at as low a figure as he can. The price which the one is able to get and the other must pay is of necessity fixed or controlled by many influences, including, of course, the transportation charges. * * * We do not understand that the act to regulate commerce contemplates or authorizes the application by the Commission of its provisions in respect to reparation on account of unreasonable rates in such manner. Whatever a court of equity might be able to do and be justified in doing in dealing with the relations between the vendor and vendee of the lumber in reference to the rates or other considerations, the Commission in confined in the making of awards for reparation to the injury or damage sustained by those who are the real and substantial parties at interest in the transaction in which such transportation charges have been made. The reparation is due to the person who has been required to pay the excessive charge as the price of transportation. It follows that we must, in making orders of reparation in these cases, upon proper proof of the shipments, make such orders in favor of those who paid the charges as freight charges, or on whose account the same were paid, and who were the true owners of the property transported during the period of transportation.”

And it is not necessary that a shipper be ultimately damaged in order to be awarded reparation:

INSTANCE.—In *Burgess v Transcontinental Freight Bureau* (13 I. C. C., 669) it was held that a shipper may be awarded reparation although not ultimately damaged. The Commission said: "These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

The members of a complaining association may be entitled to an award of reparation:

INSTANCE.—In *Independent Refiner's Assn. v. W. N. Y. & P. R. Co.* (6 I. C. C., 378) it was held that where members of a complaining association had served upon an initial carrier claims for reparation in accordance with a stipulation, the claimants were entitled to have their claims considered in the pending case.

But not where the demand for reparation is indefinite:

INSTANCE.—In *Mo. & K. S. Assn. v. A. T. & S. F. R. Co.* (13 I. C. C., 411) it was held that members of the complaining association can not be awarded reparation in a case where the complaint of the association is such that no reparation can be awarded thereon. Thus, where the demand for reparation was indefinite the members of the association could not secure reparation thereunder, as their rights could be no greater than the association's under the complaint.

The liability of the carriers for reparation is restricted to those over whose routes the shipments moved:

INSTANCE.—In *Nicola, Stone & Myers v. L. & N. R. Co.* (14 I. C. C., 199) it was said: "The complainants contend that the defendant carriers who concurred in establishing the unlawful advance in the rates under consideration are jointly and severally liable for all the damages resulting therefrom, whether or not participating in the particular rate from which the individual overcharge resulted. We can not concur in so broad a view the liability of the defendants. We do not think those carriers who received no part of the charges and who did not participate in the movement of the commodity should be liable to refund the whole or any part of the rate for the movement of a shipment in which they did not participate. We think that the liability is restricted to those carriers who participated in the transportation of the lumber via their respective routes over which the several shipments moved, and who shared in the transportation charges therefor, and that such carriers are jointly and severally liable to the persons found to be entitled to the refund."

But it appears to be unnecessary that all of the carriers operating the through route should be before the Commission, in order that reparation be awarded:

INSTANCE.—In *Independent Refiner's Asso. v. W. N. Y. & P. R. Co.* (6 I. C. C., 378) it was held that the several defendants forming a through line were

each liable for the amount of damages proven in the case to have resulted from a violation of the act in which the defendants or either of them have participated; and that it is unnecessary that all the offending carriers operating over a particular route should be before the Commission in order to enable it to award reparation.

A claim for reparation must originate in a *bona fide* cause:

INSTANCE.—In *Forster Bros. Co. v. D. S. S. & A. R. Co.* (14 I. C. C., 232) it was held that the claim for reparation must originate in a *bona fide* cause, for the Commission will not consider an erroneous rate quotation as a basis for an award of reparation, although the complainant be damaged.

But all claims for reparation, however meritorious, will not be entertained:

INSTANCE.—In *Coomes & McGraw v. C. M. St. P. R. Co.* (13 I. C. C., 192) reparation on account of demurrage charges was denied; and see section 37.

Reparation may be awarded by the consent of the parties:

INSTANCE.—In *Fain & Stamps v. A. C. L. R. Co.* (13 I. C. C., 529) a consent order awarding reparation and establishing a rate for the future was permitted.

In awarding reparation, the Commission exercises a discretion as to the amount thereof, particularly in unjust discrimination cases; and as well in determining the time from which damages may be awarded:

INSTANCE.—In *Burgess v. Transcontinental Freight Bureau* (13 I. C. C., 668) it was held that the Commission would exercise a discretion concerning the time from which reparation would be awarded; see also, *Cattle Raisers' Assn. v. M. K. & T. R. Co.* (13 I. C. C., 418); *Thompson L. Co. v. I. C. R. Co.* (13 I. C. C., 657).

Protest is not necessary to entitle a complainant to reparation in a case involving an unreasonable rate:

INSTANCE.—In *Baer Bros. M. Co. v. M. P. R. Co.* (13 I. C. C., 329) it was held that protest is not a condition precedent to a recovery of reparation for excessive freight charges, occasioned by unreasonable rates; affirmed in *Sou. Pine L. Assn. v. S. R. Co.* (14 I. C. C., 195).

In cases involving reparation due to unjust discrimination it is frequently impossible to attach to the complaint a bill of particulars for the reason that the damages occasioned by the alleged wrongful acts of the defendant are more or less speculative.⁷⁶ The complainant will be permitted to show that others similarly situated were favored by the carrier and the resulting prejudice to the complainant, but the measure of damages is not so easy to determine; for example, if it be a question of supply of cars the Commission must go into the domain of what volume and quantity of the commodity the complainant could have supplied had the equipment been furnished; this necessarily involves the prospective profit which the com-

⁷⁶ Reparation for speculative damages will not be awarded (*Frye & Bruhn v. N. P. R. Co.*, 13 I. C. C., 501).

plainant would have made upon the shipment—an uncertain amount—but, if the circumstances of the case are such that he has been sued by vendees in respect of contracts made, the computation of damages is easier made.”

Reparation will not be awarded where the damages are speculative or remote:

INSTANCE.—In *Perry v. F. C. & P. R. Co.* (5 I. C. C., 97) where it was alleged that the defendant's rates were so unreasonable that the complainant could not profitably pick and market his crop it was held, although this be a fact, it would not entitle him to reparation for the loss thereby sustained because such damages would be too speculative, uncertain and remote. Also *Frye & Bruhn v. N. P. R. Co.* (13 I. C. C., 501).

But if the damages are susceptible of computation, reparation may be awarded:

INSTANCE.—In *Pitts & Son v. A. T. & S. F. R. Co.* (10 I. C. C., 691) where a complainant made several shipments of hay on which was charged a through rate greater than the sum of locals the Commission awarded reparation in different amounts against each of two carriers, reducing the rate paid to the sum of locals.

But not unless asked for in the petition:

INSTANCE.—In *N. O. C. Ex. v. L. & N. R. Co.* (4 I. C. C., 694) it was held that where the complaint did not ask for reparation and although the carrier had corrected the inequality of rates complained of no order awarding reparation would be issued.

The right of members of an association of dealers to reparation is dependent in the first instance upon the complaint filed. It should allege that the complaint is filed for and on behalf of the several members of the association (whose names and addresses it is advisable to give), and distinctly claim reparation for each of them. With such a petition the several members may individually file intervening petitions, at any time after filing complaint, setting out the shipments with sufficient detail to apprise the defendants of the claim of each; supplemental statements of shipments may be filed with the Commission from time to time in order that the statute of limitations may not run.”

Intervening petitions and particulars of shipments will prevent the running of the statute of limitations:

INSTANCE.—In *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (10 I. C. C., 83) where an intervening petition did not claim reparation the Commission said: “If

”See *Glade Coal Co. v. B. & O. R. Co.* (10 I. C. C., 226) where the reparation is based upon the amount of coal “complainants could have mined and shipped;” also, *Richmond Eltr. Co. v. P. M. R. Co.* (10 I. C. C., 629) where the quantity of hay which the complainant had for shipment and for which cars were not furnished was proven, and in general terms the loss resulting from nonshipment, but proof was lacking respecting the discrimination against the complainant, i. e., the furnishing of cars for the shipment of hay to complainants' competitors. Reparation was also denied because of insufficient proof in *Farrer v. S. R. Co.* (11 I. C. C., 640).

”See section 88, *ante*, for practice in filing supplemental bills of particulars.

that association desired to so amend its petition at the present time as to ask for reparation we should probably permit the amendment. Our impression is that such an amendment would introduce a new cause of action and that the date of the amendment ought probably to be regarded as the beginning of proceedings for the recovery of reparation by the members of that association, but we should be inclined to receive proof of damages accruing at all times since the imposition of the terminal charge, separating the items in such way that the court might finally pronounce the proper judgment."

Cases will not be reopened for the purpose of presenting stale demands:

INSTANCE.—In *Rice, Robinson & Witherop v. W. N. Y. & P. R. Co.* (6 I. C. C., 455) it was held that a case would not be reopened in a supplemental proceeding brought only for the purpose of securing reparation, for, as the reparation demanded resulted from practices found unlawful in a decision made several years prior, it would be unjust to the carriers to subject them to further requirements in respect of such violations.

Nor should complainants ask reparation on account of unreasonable rates when the demand is stale:

INSTANCE.—In *Burgess v. Transcontinental Freight Bureau* (13 I. C. C., 668) the Commission said: "Neither should these complainants be permitted to slumber upon their rights and to accumulate against these defendants a claim for damages which may not represent in its entirety an actual loss to the complainants. The burden of an unjust freight rate usually rests upon the consumer, who can not and does not recover. Claims for reparation should therefore be promptly presented and actively prosecuted."

As the Commission permits an assignee of claims for reparation to recover, it is the custom for the several members to assign their claims to some official of the association, such as the secretary, who can file the several statements of shipments as exhibits numbering or lettering them serially.

An assignee of claims for reparation may present them:

INSTANCE.—In *Cattle Raisers' Association v. C. B. & Q. R. Co.* (10 I. C. C., 83) the Commission dealt at length concerning the relation of an association of dealers to a claim for reparation and of the rights of the members to be awarded damages: "The allegations in the present case, so far as they bear upon the question of reparation, are that the defendants have exacted and are continuing to exact an illegal charge, which is definitely described, and that the complainant, in so far as it has been or may be compelled to pay that charge, will seek a recovery of the amount paid. Dates and amounts are not given nor could they have been for the most part at the time the complaint was filed, since the claim for reparation looked to the future as well as to the past, but there is a definite statement of the exact thing for which a recovery is sought. Passing for the moment over the question of parties, or who may recover damages under this complaint, we think the allegations are plainly sufficient. The information which is furnished by this complaint is to every practical intent more definite and more extensive than that furnished by the common counts in an action at law. We must not be understood that these defendants should be compelled to go to trial upon the subject of reparation in the present state of this record. Before then a specification should be filed showing in detail the amounts for which a recovery

is sought. Up to the present time no such specification has been asked for and we can not perceive that the defendants have been in any way prejudiced by failure to file one. They have been advised of the precise nature of the claim of the complainants and their own records show every instance in which this payment has been made. If they have suffered the destruction of any of those records it has been with full notice of their materiality.

“A more serious question is, are there any proper parties in this proceeding to whom damages can be awarded, and if not can the persons who are entitled to these damages become parties at the present time. Neither the Commission nor the courts have ever had occasion to pass upon this exact question so far as can be ascertained. In deciding it, the act itself must be our guide.”

After considering sections 8 and sections 12 to 16 inclusive, the Commission said:

“To properly understand the application of these sections it is necessary to have in mind the subject-matter to which they were intended to apply, the peculiar conditions which they were framed to meet. Giving attention to the damages arising out of the exaction of an unreasonable rate, it is evident that the carrier and the shipper do not stand upon an equality. The rate is paid by thousands of different persons; it is received by but one. The amount paid by any individual shipper is usually small; the total amount received by the carrier may be enormous. Consider by way of illustration the case before us. The illegal exaction is a single dollar upon a carload. To the very largest shipper this can hardly amount to more than a few hundred dollars, while to the carrier in the aggregate it approximates a quarter of a million dollars annually. The shipper is usually of small means, the railway of vast resources. It is plain that the mere right to sue in court and recover back an unreasonable rate affords the public in most cases no substantial protection. The one who pays the freight can not afford to sue; will not sue, as the history of a half century proves. While the exactions of railroads during that period have been sufficient to produce political revolutions, there are few, if any instances in which a suit to recover an unreasonable rate has ever been prosecuted to final judgment. Beyond question one of the purposes of this act was to provide a means for the protection of the public against the exactions of railways, and one method adopted for the accomplishment of this purpose was to permit those who have a common interest to combine in the prosecution of that interest.”

And again: “This association is a proper party complainant. It filed its complaint in due form of law alleging, among other things, that its members were being compelled to pay this illegal charge and asking that the carriers be ordered to make restitution to them. We think that under that complaint the association should be permitted to show that its members have sustained this damage, and that when this has been done it will be our duty to make an order upon the carriers for the repayment of these exactions. It will have appeared in the investigation of this complaint, upon lines entirely within the original complaint, that damage has been sustained by certain parties who are thereupon entitled to an order for reparation. Unless this can be done it is difficult to see what advantage is offered by proceeding before the Commission in the collection of damages. No counsel fee is allowed and subsequent suit must be brought in court to enforce the order. While this question has never been formally discussed and decided by the Commission, hitherto it has been our practice to order reparation in behalf of the members of complaining associations. (*Independent Refiners' Asso. v. W. N. Y. & P. R. Co.* 6 I. C. C., 378; *Board of Trade of Lynchburg v. O. D. S. S. Co.*, 6 I. C. C., 633.)

“Since the law in this respect is unsettled and in order that all phases of this

question may be presented to the court it would probably be well for the members of this association who seek damages, to file a claim in the nature of an intervening petition stating that they are members of the association, have paid the charges in question and seek to recover the same in this suit. Such statement should also be accompanied by a specification giving as definitely as possible the dates and amounts paid."

And in the same case, it was said: "We will allow damages in favor of the members of the Cattle Raisers' Association of Texas from all territory down to the reduction of 1896, and from territory to which that reduction did not apply down to the present time. There may be some question whether these damages should extend beyond the date of our original order, but we think that the presumption is that the condition of things continues as it then existed, and that the complainants should be allowed damages in this accounting up to the date of hearing. Those accruing before and those since the order should, however, be kept separate so that, if this opinion turns out to be wrong, the whole order will not be vitiated. Since conditions may have changed since the date of that order the defendants will be allowed to show, if they desire, such subsequent facts as make now the entire through rate, including the terminal charge, a reasonable one."

Sec. 121. Practice in applications for relief under the long and short haul section.—Applications of a carrier for relief from the operations of the fourth section, under the proviso thereof, are made by petition, which must be verified,⁷⁹ setting up the facts and circumstances which it is claimed will justify the relief sought; under the provisions of the statute the Commission is required to make investigation,⁸⁰ for it is only after investigation that the Commission is authorized to permit the carrier to charge less for the longer than for the shorter distance for the transportation of passengers or like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

As the Commission is authorized to grant the relief only "in special cases"⁸¹ it follows that each case must be determined upon its own merits and in connection with the special circumstances surrounding it; the Commission upon application made will consider not only the features of the case but keep in view the objects for which the law was enacted.

An application for relief from the operation of the fourth section must be direct and for the purpose; thus, where carriers defendant offer to reduce rates complained of provided the Commission would relieve them from the operation of the fourth section, it was held that such action by the defendants is not an application for an order for relief under the provisions of the long and short haul clause.⁸²

The order granting the application is usually temporary and may

⁷⁹ Re S. P. R. Co. (1 I. C. C., 6).

⁸⁰ Proviso, sec. 4 (Re S. P. R. Co., 1 I. C. C., 6).

⁸¹ Re C. H. & D. R. Co. (6 I. C. C., 323).

⁸² Col. F. & I. Co. v. S. P. Co. (6 I. C. C., 488).

have no special time stated,⁸⁸ or, if to meet some particular contingency which will likely disappear within an ascertainable time, the order may be made effective for a definite period.

If the operation of the fourth section of the statute creates a hardship, the carrier should apply to the Commission as provided in the proviso to that section :

INSTANCE.—In *Fewell v. R. & D. R. Co.* (7 I. C. C., 354) the Commission held that any injustice or undue hardship which might result to carriers from compliance with the fourth section of the statute is removable by the Commission in the manner pointed out by the proviso clause of the section.

Sec. 122. Dismissal of cases at the request of the parties.—Ordinarily, at the request of a party complainant to a formal complaint the proceeding will be dismissed if the request be made before answer, and after answer upon the conditions prescribed by the Commission. These conditions are that if relief has been granted by the carrier, the record of the case shall show the relief granted and an undertaking on behalf of the defendant that the relief granted will be available to others situated similarly as is the complainant, and that the relief will be in force and effect for a period of at least two years. Thus, where a complaint is brought alleging unreasonable rates and reparation be not prayed for and defendants reduce the rate, the new rate must apply to all situated as is the complainant and the new rate must be in force and effect at least two years. The time required in which the new rate must be in force and effect, two years, is doubtless taken from the language of the statute in section 15 providing that all orders of the Commission shall continue in force and effect for such period and time not exceeding two years, as shall be prescribed in the order of the Commission.

If the complainant claims and prays for reparation the Commission will not, even at the request of both parties, enter an order directing or permitting the carrier to pay reparation unless there be filed in the proceeding a stipulation showing the amount of reparation to be awarded. It is required that this stipulation shall contain a full and complete description of each shipment upon which overcharge is claimed, and must show in each instance date of shipment, car initials, car number, weight of shipment, rate applied, total charges paid, and overcharge claimed. Such stipulations must be under oath of persons competent to make an affidavit as to the contents of the stipulation, both on behalf of the complainant and also on behalf of the defendant.

Sec. 123. Refund of overcharges through error.—Through error of applying a rate greater than the filed and published tariff carriers are frequently willing to make a refund of the excess freight. Such re-

⁸⁸ *Re S. R. Co.* (not reported, 1896), *re G. N. R. Co.* (not reported), *re D. L. & W. R. Co.* (not reported), *re S. P. Co.*, 60 days (not reported).

fund is only permitted upon a verified statement showing the date and character of shipment, weight, consignor, consignee, rate applied, and charges collected and proper rate and amount of refund proposed. For this purpose carriers are expected to use the form prescribed by the Commission (see Form 11a, Appendix).

Sec. 124. Orders of the Commission.—The order of the Commission may be either interlocutory or final.

Interlocutory orders are those passed pending the hearing, such as order permitting intervention, order for answer, fixing date of hearing, of argument, etc.

Final orders are those passed after or concurrent with opinion rendered in the case. Such orders are not final in the sense that no other proceedings can be predicated thereon, for one may apply for a rehearing (see section 166) or there may be proceedings in the Federal courts to enforce or set aside or annul them.

The orders of the Commission after opinion take such form and are in such language as will secure the proper disposition of the matter in accordance with the opinion in the case. The order may be for various purposes: dismissing the petition; dismissing the petition, without prejudice; "establishing through route and joint rates; commanding the defendant to cease and desist from a rate or practice, and requiring it to publish and charge another rate or establish a practice; fixing the classification of a commodity; awarding reparation. The order may be in a sense a composite one,"⁸⁵ for it may grant relief as against all defendants or as against some, and dismiss as to others, or

⁸⁵ Orders dismissing the petition without prejudice appear to be of two kinds, e. g. as in *Harrell v. M. K. & T. R. Co.* (12 I. C. C., 28), where the order was that the proceeding be "dismissed without prejudice to the right of complainant or any other person to file complaint alleging the unreasonableness of the rate involved herein, in the event that such rate shall become of actual consequence to shippers and consignees;" or, as in *Johnston-Larmier D. G. Co. v. W. R. Co.* (12 I. C. C., 52), where for defect of parties it was ordered: "that the complaint in this proceeding be and is hereby dismissed without prejudice." In either event, the complainant, if able to obviate the defects of pleading or evidence, could proceed anew; for such an order could not operate as a bar to the same claim, seeking the same relief, if rested on different allegations of facts. See *Mobile v. Kimball* (102 U. S., 691).

⁸⁶ For the form of various orders see establishing through routes and rates (*Cattle Raisers' Assn. v. G. H. & S. A. R. Co.* (12 I. C. C., 20); awarding reparation (*Blackwell M. Co. v. M. K. & T. R. Co.* (12 I. C. C., 24); dismissing without prejudice (*Harrell v. M. K. & T. R. Co.* (12 I. C. C., 28); *Johnston-Larimer D. G. Co. v. W. R. Co.* (12 I. C. C., 52); dismissing complaint (*Durham v. I. C. R. Co.*, 12 I. C. C., 38); commanding the defendant to cease and desist from charging one rate and requiring it to publish and exact another (*Johnston-Larimer D. G. Co. v. A. T. & S. F. R. Co.*, 12 I. C. C., 48); commanding a carrier to cease and desist from charging one rate and requiring it to publish and exact another, and awarding reparation (*Texas Cement Plaster Co. v. St. L. & S. F. R. Co.*, 12 I. C. C., 68); commanding a carrier to cease and desist from a practice (*Preston & Davis v. D. L. & W. R. Co.*, 12 I. C. C., 115); fixing the classification of an article (*Van Camp Burial Vault Co. v. C. I. & L. R. Co.*, 12 I. C. C., 80); awarding reparation as to a defendant and dismissing as to the others (*Am. Grass Twine Co. v. C. St. P. M. & O. R. Co.*, 12 I. C. C., 141); commanding a defendant to cease and desist from charging one rate and holding the case

it may command several things to be refrained from or to be done.

Orders are prepared in the office of the Commission and without consultation with the attorneys in the case; orders are not always passed concurrently with the rendering of the opinion but the usual rule is that the order is drawn and made a part of the opinion at the time the opinion is made public. The order is not, however, made a part of the printed decision.⁸⁸

The Commission outlined the kinds of orders which it was authorized to issue under the former act in *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (10 I. C. C., 83), as follows:

"This Commission may under the act make orders of two kinds. It may make an administrative order which refers to the future, or it may award damages for what has transpired in the past. The purpose and scope of these two orders is entirely different. The methods of enforcing them are equally distinct. In one case application is made to a court of equity which determines all questions of fact and employs, if need be, its mandatory powers in the enforcement of the orders. In the other case a suit at law is brought, in which the issue of fact is decided by jury. These two orders may be made in the same case, but they are in no way connected and the right to make one is not necessarily conclusive of the right to make the other. If, for example, upon a complaint alleging the unreasonableness of a rate and demanding reparation the Commission should find the rate unreasonable and order the carrier to charge for the future a given rate which was determined to be reasonable, that order would be invalid because beyond the power of the Commission, and the court would decline to enforce it, but the refusal of the court to enforce such an order would be no bar to the right of the Commission to grant reparation to the extent that the carrier had exacted more than a reasonable rate in the past."

Orders will not be granted where after hearing and submission but before the decision the defendant concedes the relief sought;⁸⁷ nor where issues have been made and no proofs are offered;⁸⁸ nor where the answer of the defendant must be assumed to satisfy the complainant⁸⁹ nor where the cause of complaint had been removed by the action of a substituted party defendant;⁹⁰ nor where an inequality of rates had been corrected.⁹¹ Yet an order will issue as to part of the grievance where only part has been corrected.⁹²

Sec. 125. Duration of orders.—Orders made in pursuance of section 15 of the act,⁹³ being orders to cease and desist from charging certain

open for reparation (*Society of Am. Florists v. U. S. Exp. Co.* 12 I. C. C., 121); commanding part of the defendants to cease and desist from charging one rate and requiring them to publish and exact another, and dismissing as to other defendants (*Rau. v. P. R. Co.*, 12 I. C. C., 999).

⁸⁸ The orders of the Commission in a few cases will be found in Volume 12 I. C. C. (Lawyers Co-operative Publishing Co. edition).

⁸¹ *M. & J. Union v. M. & St. L. R. Co.* (1 I. C. C., 227).

⁸⁸ *Leonard v. U. P. R. Co.* (1 I. C. C., 185).

⁸⁹ *Jackson v. St. L. A. & T. R. Co.* (1 I. C. C., 184).

⁹⁰ *Boyer v. C. O. & S. W. R. Co.* (7 I. C. C., 55).

⁹¹ *N. O. C. Ex. v. L. N. O. & T. P. R. Co.* (4 I. C. C., 694), *Mich. Box Co. v. F. & P. M. R. Co.* (6 I. C. C., 335).

⁹² *Rice v. St. S. W. R. Co.* (5 I. C. C., 660).

⁹³ Appendix.

named rates or enforcing certain practices and fixing rates or practices, take effect at such reasonable time as the Commission may designate, but not in less than thirty days and they are to continue in force not more than two years.⁹⁴ Thus, the discretion of the Commission concerning the time at which the order, other than for the payment of money, may take effect is limited; the defendant is given by the statute thirty days in which to determine whether or not it will obey an order or contest it and it is also safeguarded in that an order shall not continue for a period longer than two years. Such orders usually are made to take effect about forty-five days from the date thereof and are made to be in force and effect for the maximum period of two years, the additional time of taking effect being granted for the purpose of permitting the carrier to prepare schedules and file them. An order is frequently accompanied by permission to file and make effective the new rates and practices in less than the statutory period of thirty days as provided in section 6.

Where the defendant had satisfied the complaint and changed the rate complained of, the Commission required that the new rate should be kept in force and effect for a period of two years.⁹⁵

Orders for the payment of money are not subject to the time limit provided in section 15, being especially exempted; such order usually provides that payment of the amount found to be due by way of reparation shall be made on or before a day named, the date being about forty-five days from the date of the order.

⁹⁴ In *I. C. C. v. L. & N. R. Co.* (73 Fed., 409), held under the former act that it is no objection to an order of the Commission, that it is made by its terms to operate indefinitely without any reservation or power to modify.

⁹⁵ *Ocheltree G. Co. v. C. R. I. & P. R. Co.* (13 I. C. C., 238); but the time during which the rate should be kept in force was not required in *Bunch v. C. R. I. & P. R. Co.* (13 I. C. C., 377).

CHAPTER VII

EVIDENCE BEFORE COMMISSION

Sec. 126. Application of the rules of evidence.—None of the technical rules of evidence applies in proceedings before the Commission; in fact, the rules of evidence are of less moment before the Commission than before legislative committees, boards of assessment, or administrative bodies. In every instance the Commission seeks the facts germane to the inquiry, paying little regard to the canons of evidence. How a witness may know the facts, in what manner or by what means he becomes possessed of the knowledge is immaterial, within reasonable limits. The essential item is the fact or facts, and not the means by which they have been acquired. Upon cross-examination a witness may be asked how he knows to be true what he has stated and the means by which he obtains his knowledge affects the weight of his testimony rather than his competency to testify.

Should a witness be interrogated concerning a matter not within the issue, an exception will avail nothing and hence the plan of noting an exception is not indulged in. Not infrequently a witness is asked concerning a matter apparently not germane to the inquiry; unless such matter be clearly foreign to the subject, the testimony is generally received for what it may be worth. At times such testimony by subsequent evidence becomes relevant and even material. Unless, however, it promises an advantage, the practitioner will refrain from such excursions into the domain not bounded by the merits of the inquiry.

In cases before the Commission there is a necessity for liberality concerning the rules of evidence, whether one consider the competency of the witnesses or the nature of the testimony. The Commission is not a court, and one of the reasons frequently alleged for control over interstate carriers by a Commission is the inability to prove in court the unreasonableness of rates, applying the strict rules of evidence. As long as the Commission keeps within the general common-law rules of evidence, even though liberally applied, probably no objection can be made. The question of what rules of evidence should govern the Commission has not been adjudicated by the courts. In a somewhat similar but different body (the Court of Claims), where the Congress had provided no rules of evidence, the court held

that the rules of evidence as found in the common law ought to govern in actions before it.

The common-law rules of evidence should govern in the absence of statute:

INSTANCE.—In *Moore v. U. S.* (91 U. S., 270), the Supreme Court laid down the rules by which the Court of Claims should be guided in accepting and rejecting evidence before it: “The questions are: By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? Or is it to be governed by some system of law? In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the common law. Cases involving the principles of the civil law are the exceptions. We think that where Congress has not provided and no special reason demands a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims. If a more liberal rule is desirable, it is for Congress to declare it by a proper enactment.”

Sec. 127. Judicial notice.—The Commission takes judicial notice of all facts of which a court would take notice, and in addition, of all tariffs, reports of railways, and many other matters essential to the proper understanding and decision of the case as presented. Specific reference to the tariff, report, or other matter of which it is desired that the Commission take notice, must however be made at the hearing, but their formal introduction in evidence is not necessary.¹

The Commission frequently takes judicial notice of evidence adduced in other proceedings, opinion in which has not as yet been rendered—e. g., if there be an investigation brought by the Commission of its own motion pending and the same questions arise in the proceeding on formal complaint, facts in one case will be judicially noticed in the other; so also, if the two cases be direct proceedings or complaints.

Evidence introduced in one case may be used in another:

INSTANCE.—In *Toledo P. Ex. v. L. S. & M. S. R. Co.* (5 I. C. C., 166) the Commission had occasion to consider whether or not evidence taken in other similar prior cases could be considered in a pending case. Upon agreement of counsel to the effect that the evidence in the two cases should be considered in connection with the determination of the later case, which agreement counsel attempted to rescind, the Commission said: “To avoid further delay in a case, already unavoidably long delayed, it seems proper to the Commission to hold that the case should be considered upon the basis of the original agreement, namely: The evidence offered by the complainants, including the depositions taken without notice, and the evidence offered by defendants, including the evidence taken in the Boston Board of Commerce cases. As to the propriety of this course and as justifying it, the following suggestions are made: The facts shown by the whole

¹ *Boston F. & P. Ex. v. N. Y. & N. E. R. Co.* (4 I. C. C., 664).

record are almost, if not altogether, either admitted or established by uncontradicted testimony. The hearing being an investigation held for the purpose of making a report, upon which an order is to be based, the ascertainment of the facts rather than the method of their ascertainment should be considered. The evidence seems to be entirely pertinent to the inquiry to be made, and the agreement should be maintained, especially as ample opportunity and time have been given to allow complainants to offer any additional evidence deemed necessary."

In *Hurlburt v. P. R. Co.* (2 I. C. C., 130), the case was submitted upon the testimony taken in *Hurlburt v. L. S. & M. S. R. Co.* (2 I. C. C., 122).

Section 15 of the original act permitted the Commission to consider not only the testimony of witnesses but it was also held^a that under this section it was undoubtedly within the province of the Commission to consider, in any case, the contracts and tariffs which are required to be filed with the Commission as provided in section 6.

The matters of which the Commission will take judicial notice are: Matters of common knowledge in general; public or private statutes; treaties and rights thereunder; municipal ordinances; foreign laws; legislative journals; proceedings and decisions of courts and State railway commissions; the official decisions and acts of Federal officers; political and municipal decisions; geographical facts, including the location of the several lines of railways within the United States and adjacent foreign countries; and the customs and usages generally in practice in railway management; also railway reports.

Sec. 128. Nature of testimony before the Commission.—Testimony before the Commission, in nearly all cases and to a marked degree, is unique in that it is expert or opinion evidence.^b In actions involving rates and practices, there is necessity for the expert and opinion evidence of the shipper and the railway traffic manager; so, also, if there be under consideration undue discrimination, preference or advantage. If the proceeding involve the making of switch connections, the engineering expert is not infrequently required. In other cases expert and opinion evidence may or may not be necessary according to the circumstances of the particular case.

It should not be inferred from what has been said, that only opinion or expert evidence is admissible; quite the contrary is the case. The testimony of a witness may be upon the facts, as such, from which the witness states his opinion; or, he may state his opinion and support it by the facts.^c

^a The Commission will consider as in evidence without formal offer contracts, tariffs, and schedules filed with it (*Boston F. & P. Ex. v. N. Y. & N. E. R. Co.*, 4 I. C. C., 664); reference to the contracts, tariffs and schedules ought, however, to be made, and become a part of the record.

^b That the Commission may give little weight to the statistics and opinions of statisticians, see the opinion in *Cattle Raisers' Assn. v. M. K. & T. R. Co.* (13 I. C. C., 418).

^c On the general subject of expert and opinion evidence, see in addition to the works on Evidence, Rogers: *Expert Testimony*; Lawson: *Expert and Opinion Evidence*.

The General Rules of Practice respecting witnesses and their competency, as laid down by Lawson,⁵ if followed, will be of advantage to the practitioner and prevent the attempted introduction of improper evidence:

Any witness is competent to state facts perceptible to his senses and not involving matters of opinion;

By using language indicative of an incompetent opinion or conclusion, a witness' evidence is not inadmissible if it appears that he is really stating a fact;

The opinion of an ordinary witness is not permitted when it is derived from the statements of others, or is based on extraneous circumstances;

The opinions of both experts and nonexperts should have weight according to their opportunities and qualifications.

Speaking of the difference in the character of the testimony required to test the reasonableness of an entire schedule and to test the reasonableness of a particular schedule, the Commission said (*Frye & Bruhn v. N. P. R. Co.*, 13 I. C. C., 50):

There is a wide difference in the character of testimony required to test the reasonableness of an entire schedule of rates covering the whole traffic of a particular carrier and that required to test the reasonableness of a rate on a particular commodity between two definite points. Whether an attack upon an entire schedule of rates is well founded or not is to be determined largely by ascertaining whether the gross amount of traffic carried on those rates affords the carrier, above its operating expenses and taxes, a reasonable return upon the fair value of its property. But whether it lies within the possibilities of some system of accounts that may be devised, and that is strongly denied by eminent writers on railway problems, certainly the present state of the science of railway accounting does not enable us upon any such basis to fix with certainty a reasonable rate upon a particular commodity between two points. And neither the complainant nor the defendants have pretended to analyze the operating expenses and taxes of the defendants with a view to assigning to the particular traffic now under consideration a definite proportion of those expenses as a factor for fixing a reasonable rate. We are left by both parties to arrive at a conclusion as to the reasonableness of the rate complained of, solely, as counsel for the complainant puts it, by the exercise of our judgment, enlightened by experience and by such evidence as the parties have adduced that tends to aid us.

Indicative of the character of testimony required in a case concerning unreasonable rates, the following elements (*Snyder: Annotated Interstate Commerce Act*, p. 196; cf. *Wentworth: Interstate Commerce Law*, p. 21) may be considered:

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| 1. Amount of through and local business. | 9. Cost of service. |
| 2. Bonded debt. | 10. Cost of local business. |
| 3. Bulk. | 11. Distance. |
| 4. Character of commodity. | 12. Dividend on capital stock. |
| 5. Comparison of rates. | 13. Empty cars. |
| 6. Competition. | 14. Fixed charges. |
| 7. Consequences of rate changes. | 15. Former rates. |
| 8. Cost of production. | 16. Geographical situation. |
| | 17. Initial expenses. |

⁵ Lawson: *Expert and Opinion Evidence*, p. 603, et seq.

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| 18. Market cost. | 27. Rates, prima facie. |
| 19. Operating expenses. | 28. Risk. |
| 20. Other articles consumed. | 29. Special train rates. |
| 21. Population along the line. | 30. Storage capacity. |
| 22. Proportion to local traffic. | 31. Unsettling of rates. |
| 23. Relative reasonableness of rates. | 32. Use to the public. |
| 24. Relative amount of through and
local business. | 33. Value of freight. |
| 25. Return loads. | 34. Volume of business. |
| 26. Revenue. | 35. Weight. |

Sec. 129. Qualification of witnesses.—It is not often that any question arises concerning the qualification of witnesses to testify before the Commission. Those general and uniform rules which are applicable to witnesses before the Federal courts doubtless would be used in determining their qualifications if any question should arise, but not the special and uncommon rules laid down by State statutes, but which are respected by the Federal courts in the several States. Interest in the proceeding, race, color, sex, or religion would not disqualify, but should self-confessed turpitude, insanity, or conviction of perjury be apparent they would probably operate as a disqualification. Disqualification by reason of infancy, coverture, or alienage has not arisen and naturally is not likely to arise, owing to the nature of the proceedings.

The competency of witnesses in Federal courts is provided for by section 858, Revised Statutes, as amended by the act of June 29, 1906, (34 Stat. L., c. 3608, p. 618):

“The competency of a witness to testify in any civil action, suit, or proceeding in the Courts of the United States shall be determined by the laws of the State or Territory in which the court is held.”⁶

As the Commission has its principal office in Washington, perhaps the rule respecting competency of witnesses in the District of Columbia, binding on the Supreme Court of the District of Columbia (a court of the United States), may be applicable. Section 1063 of the Code of Law for the District of Columbia provides:⁷

Except as herein elsewhere provided, no person shall be incompetent to testify in any civil action or proceeding by reason of his being a party thereto or interested in the result thereof; but, if otherwise competent to testify, he shall be competent to give evidence on his own behalf and competent and compellable to give evidence on behalf of any other party to such action or proceeding.

⁶For the practice prior to the above amendment, see Rose, Federal Procedure (section 1735).

⁷Conviction of crime, other than perjury, does not disqualify (section 1067); testimony of surviving party to a transaction can not be given, unless the opposite party first testify in relation to same (section 1064); testimony, given when one is competent, may be given if the witness becomes incompetent, in proceedings between the same parties in relation to the same matter (section 1065).

The Federal rule respecting incompetency to testify because of conviction of perjury is section 5392, U. S. Comp. Stat. 1901, p. 3653:

Every person (i. e., guilty of perjury) * * * shall, moreover, hereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

The maker of a freight classification is not competent to interpret it; as other written or printed documents it must speak for itself:

INSTANCE.—In *Hurlburt v. L. S. & M. S. R. Co.* (2 I. C. C., 122) it was held that the makers of a classification are not competent to testify as to their construction of it. The Commission said: "A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself."

Sec. 130. Subpoena *duces tecum*.—The Commission early laid down the rules under which it would issue a subpoena *duces tecum* at the request of a party to a proceeding either directed to strangers or to other parties or their agents.⁸

A complainant had made an application for a subpoena *duces tecum* to prominent persons not parties to the suit and also to the agents of the defendant carriers. The application was denied both as against the strangers to the proceedings and against the parties. The Commission, after considering its authority as conferred by the act to regulate commerce, the Revised Statutes upon this particular subject, and the practice in Federal courts,⁹ laid down the rule that when directed to strangers to the proceedings the application should be made in writing and specify as nearly as may be the books, papers, or documents, for the production of which the subpoena is desired, the application to be accompanied by an affidavit that the books, papers and documents described are in possession of the witness or under his control, and set forth facts making a *prima facie* case that the documents contain evidence that is material and necessary to the party applying.

As to parties to the proceedings, and particularly defendant carriers, the Commission held that it is not required that the facts showing the *prima facie* case need be so strong against such defendant as against strangers; upon the theory that it is the duty of the Commission to execute and enforce the law, and that it is also their duty to call for the production of the books and papers of the carrier whenever the nature of the inquiry to be gone into is such as to render their production necessary or proper.

Where a complainant shipper sought by a subpoena *duces tecum* to

⁸ *Rice v. C. W. & B. R. Co.* (3 I. C. C., 186).

⁹ *U. S. v. Babcock* (3 Dillon, C. C., 566).

obtain a contract between the defendant carrier and other shippers, the contracts referring to the rate of transportation of the same commodity in which the complainant dealt, the application was denied on the ground that the third party (other shippers) had rights which must be respected, and that they had a right to object to the contracts being produced.¹⁰

Appreciating the burden upon carriers in producing their books and papers, perhaps at a great distance from the place where such records are kept, the Commission has indicated that the same result might be reached otherwise than by the subpoena *duces tecum*. The Commission said—

there are several modes of procedure by which the inconvenience to the defendants of producing books, and the delay and labor of going over their entries might be avoided by petitioner. If one or more witnesses should be subpoenaed from the different companies proceeded against, and a notice should be served with the subpoena requiring the witnesses to furnish the published rates and tariffs of such company for a specified period, and also requiring them to furnish statements of the actual charges made, and car facilities furnished, during such period to the Standard Oil Trust and the others named in this application, if different from the published tariffs and schedules, it would probably be sufficient for all the purposes of these and other proceedings; or, if the parties would take depositions, by consent, in advance of the hearing, it would probably answer the same purpose.¹¹

Applications for subpoenas *duces tecum* have not been frequent, attorneys either following the suggestion just laid down, or at the taking of testimony, asking the officials of the carriers to have made up certain relevant statements from the records of the carrier; and the carriers have ordinarily complied with such requests even at considerable expense.

Sec. 131. Evidence under the pleadings.—The rules concerning the character of evidence admissible under the pleadings receive little attention in proceedings before the Commission. The complainant is usually permitted to introduce any testimony which may tend to show either what he had alleged to be the facts, or other facts which may constitute a violation of the act of the same character as alleged. So, also, the defendant is not bound by the defenses similar to those pleaded. The liberality of the practice in this behalf will not permit one to introduce testimony not germane to the controversy; nor will evidence respecting a particular fact be applied to other facts not included in the allegations of the complaint.

Evidence introduced for one purpose is not admissible for another:

INSTANCE.—In *Business Men's Assn. v. C. & N. W. R. Co.* (2 I. C. C., 73) where evidence had been introduced by a party and he had been permitted to do so for the single purpose of the bearing such evidence might have upon the reasonableness of a rate and it being inadmissible for any other purpose but it also tended to show other facts, it was held that it would be improper and un-

¹⁰ *Haddock v. D. L. & W. R. Co.* (4 I. C. C., 296).

¹¹ *Rice v. C. W. & B. R. Co.* (3 I. C. C., 186).

just to the carrier to consider such evidence in respect to the other facts, because it would involve a collateral inquiry and because the carrier had not been allowed to controvert the testimony as applied to the other facts.

And evidence of one fact is not evidence of another, as the erroneous application of an unlawful rate, less than the published tariff, is not evidence that a published higher rate is unreasonable;¹² and a voluntary reduction of rates is not evidence that the former rate was unreasonable;¹³ and the continuance of a given rate is not conclusive evidence of its reasonableness;¹⁴ and evidence of rebates allowed in the past, when offered by the shipper who received them, is not competent to show that the published rate is unreasonable.¹⁵

Sec. 132. Best and secondary evidence.—Secondary evidence¹⁶ is admissible when the absence of best evidence is satisfactorily accounted for; the Commission is lenient in the application of this rule, permitting the introduction of carbon copies, press copies, and copies made from duplicates.

A frequent instance of secondary evidence before the Commission is where the originals consist of numerous documents which can not be conveniently examined by the Commission and the fact to be proved is the general result of the whole collection. The Commission permits the fact to be shown by a witness from an examination of these documents.

Sec. 133. Order of evidence.—The order in which testimony is introduced is substantially the same as in the Federal courts, the Commission being more lenient, however, in the exercise of discretion in admitting evidence after the complainant has closed his case in chief. Where the complainant introduces additional evidence after the case in chief has been closed the defendant is given the right to rebut such testimony.¹⁷

The advantages of following the customary rules respecting the order of proof are manifest. The complainant ought to introduce all his evidence to make out his side of the case, except what is purely an answer to the defense; the defendant should submit all his evidence and then opportunity be given to the complainant to present proper evidence in rebuttal. The complainant may, however, introduce as part of his case in chief, evidence to rebut matters which the defendant has set up in its answer. Should the rebutting evidence of the complainant bring out new and distinct facts the defendant should

¹² *Bovaird Supply Co. v. A. T. & S. F. R. Co.* (13 I. C. C., 56).

¹³ *Ottumwa B. Co. v. C. M. & St. P. R. Co.* (14 I. C. C., 121).

¹⁴ *Holmes & Co. v. S. R. Co.* (8 I. C. C., 561).

¹⁵ *Frye & Bruhn v. N. P. R. Co.* (13 I. C. C., 501).

¹⁶ For the meaning of and what is included in the term "secondary evidence," see *Greenleaf* (sec. 84 et seq.); for cases in which secondary evidence may be given see *Stephen* (art. 71); *Greenleaf* (sec. 588 et seq.); *Wharton* (sec. 150 et seq.).

¹⁷ For the rules respecting order of proof see, *Abbott's Trial Brief* (Chapter VI).

have an opportunity to introduce testimony to contradict such new facts.

Good faith requires that both complainant and defendant shall present all material evidence pertinent to the subject of the inquiry; as an aid thereto, the general equity question is not infrequently propounded to witnesses.

Sec. 134. Burden of proof.—The burden of proof before the Commission is on the party asserting or denying a particular fact unless the fact be peculiarly within the knowledge of one of the parties, in which event that party has cast upon him the burden of showing the specific fact. Owing to the slight value of presumptions before the Commission the maxim “He who affirms must prove” governs to a greater degree than in the courts.

The Rules of Practice (No. X.) provide:

* * * The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the petition. The defendant must also prove facts alleged in the answer, unless admitted by the petitioner, and fully disclose its defense at the hearing.

Evidence in certain cases is required:

INSTANCE.—In *Holbrook v. St. P. M. & M. R. Co.* (1 I. C. C., 102) where a complaint was made of excessive rates, the burden of proof was laid upon the complainant and no proofs being put in by either party the complaint was dismissed.

In *Leonard v. U. P. R. Co.* (1 I. C. C., 185) it was held that no relief could be granted on issues held by the pleadings in the absence of proof offered.

And in *Spartanburg B. of T. v. R. & D. R. Co.* (2 I. C. C., 304) it was held that the Commission was unwilling to determine the relevant reasonableness of rates of many States and in a large extent of territory upon the mere face of tariffs and without further proof.

In *B. of T. (sub nom Harwell) v. C. & W. R. Co.* (1 I. C. C., 236) it was held that the same measure of proof is required to show discrimination under section 2 and prejudice and advantage under section 3 when water competition is alleged as a justification.

The evidence may be insufficient to sustain the allegations:

INSTANCE.—Where the evidence is insufficient to determine the question the Commission will make no order, for example see *Holdzkorn v. M. C. R. Co.* (9 I. C. C., 42), *McGrew v. M. P. R. Co.* (8 I. C. C., 630), re *Alleged Unlawful Charges etc.* (8 I. C. C., 585), *Savannah F. and T. Bureau v. L. & N. R. Co.* (8 I. C. C., 377), *Howell v. N. Y. L. E. & W. R. Co.* (2 I. C. C., 272).

In reparation cases the evidence has been frequently insufficient whereon to base damages, for example see *Richmond Eltr. Co. v. P. M. Co.* (10 I. C. C., 629), *Castle v. B. & O. R. Co.* (8 I. C. C., 333), *Perry v. F. C. & P. R. Co.* (5 I. C. C., 97).

Sec. 135. Presumptions.—The usual evidence rules regarding presumptions apply before the Commission but the weight of a presumption is not as strong as in courts of law. The reason for this is, doubtless, that transportation, including rates and practices pertain-

ing thereto, is largely dependent upon commercial conditions¹⁸ existing locally or applicable to the entire country; there is a causal relation between commercial conditions and transportation. Therefore, a change in conditions, either sudden or gradual, may warrant a change in railway practices and thereby set at naught a rebuttable presumption.

There is no line of demarkation in practice before the Commission between conclusive and rebuttable presumptions; and it is doubted whether there be any conclusive presumptions, except the one that a common carrier engaged in transportation of the kind and by the means mentioned in the first section of the act is subject to its provisions.

The usual presumptions apply as to the legality and regularity of official acts, of the continuance of a pre-existing state of things, as to foreign laws and laws of the several States of the United States, from spoliation of testimony, and as to mailing and delivery of mail matter.

The filing of a schedule does not create a presumption of the legality of the rates therein:

INSTANCE.—In *San Bernardino B. of T. v. A. T. & S. F. R. Co.* (4 I. C. C., 104) it was held that the filing of schedules of rates with the Commission as required by the statute raises no presumption as to their legality and further that no omission of failure to challenge or disprove a schedule of rates so filed can have the effect of making rates lawful which are unreasonable.

In *Suffern, Hunt & Co. v. I. D. & W. R. Co.* (7 I. C. C., 255) it was held that the fact that circulars containing rules concerning carload weights had been filed with the Commission, and no opinion had been expressed thereon as to their legality, raises no presumption of approval by the Commission of the rules or regulations in the circulars or of the manner in which they were established.

An advance in rates may be considered unjust unless explained:

INSTANCE.—In *Pacific Coast Mfg. Assn. v. N. P. R. Co.* (14 I. C. C., 28) it was held that where an advance was made in rates which had long been maintained and it was shown that the traffic affected was large and constantly increasing, it was held that the advance would be considered unjust unless satisfactorily explained.

¹⁸ "Commercial conditions," while used frequently in justifying rates and practices of carriers has no well defined meaning. As ordinarily used it refers to the (a) competition of merchants, (b) competition of places, (c) cost of production or manufacture, and (d) charge for transportation. It may, however, import other elements.

In *re Proposed Advances in Rates* (9 I. C. C., 382) it was said: "Carriers gave as one of their reasons for the present advances in these rates, difference in commercial conditions. Just what commercial conditions were referred to, or just what difference was supposed to be, was not definitely stated. * * * And the reason assigned by the carriers for these advances in grain rates was difference in traffic conditions. It was said that competition was less active, and that rates could therefore be maintained.

"We think herein is found a substantial reason why these rates could be advanced and maintained; whether it be also a reason why they should be is another matter."

Changes in rates require explanation:

INSTANCE.—In *Ocheltree Grain Co. v. St. L. & S. F. R. Co.* (13 I. C. C., 46) it was held that where a carrier had in force a certain rate and for a period of two months put in force a higher rate and then reduced the charge to the former rate, the action of the carrier was in the nature of an admission (from which a presumption arose) that the original rate is a fair one unless explained.

There is no presumption as to reasonableness of former rates:

INSTANCE.—In *Loud v. S. C. R. Co.* (5 I. C. C., 529) it was held that the reduction of rates raises no presumption that the former rates were unreasonable as the reduction could be accounted for by other facts such as a decrease in the cost of transportation or an increase in the volume of traffic in which such rates apply.

Long-continued practice does not raise a presumption of its legality:

INSTANCE.—In *Stone v. D. G. H. & M. R. Co.* (3 I. C. C., 613) it was held that there was no presumption as to lawfulness of a free cartage furnished at one place for many years before the passage of the act.

Sec. 136. Estoppel.—The principle of estoppel¹⁹ does not apply to parties to proceedings before the Commission. What has been asserted by a complainant in a preceding case similar to a present one does not place him in such a position that the earlier assertions bind him in the later complaint; so, also, the defendant is not precluded from setting up facts attempting to justify its action, which facts differ in two somewhat similar cases.

The reason the customary rules relating to estoppel do not apply before the Commission is, doubtless, the same as alleged in some of the earlier reports to the effect that estoppels are odious and not to be favored in law because they tend to exclude the truth.²⁰

One who has participated in a proceeding in one capacity is not estopped to proceed subsequently upon substantially the same allegations against the same defendants in another capacity:

INSTANCE.—In *Kemble v. L. S. & M. S. R. Co.* (5 I. C. C., 166), consolidated with *Toledo P. Ex. v. L. S. & M. S. R. Co.*, the question arose whether the petitioner in the first-mentioned case is estopped from maintaining his complaint because in a prior case (*Boston C. of C. v. L. S. & M. S. R. Co.*, 1 I. C. C., 436) against substantially the same defendants he was one of a committee appointed by the chamber of commerce to prosecute the case and verify the petition; in the prior cases after investigation the Commission had dismissed the petition. Determining this question the Commission said:

“ * * * The doctrine of estoppel of record does not seem applicable to the case under consideration. It is applied to the record and judgment of both general and inferior courts. The Commission is not a court. It is a special tribunal whose duties though largely administrative are sometimes semi or quasi judicial. It is required to investigate and report. The law creating the Commission does not mention its final act as a judgment. It renders no judgment, enters no decree. From these considerations it is believed that the rule of es-

¹⁹ Estoppel is where a man “has done some act which the policy of the law will not permit him to gainsay or deny.” *Greenleaf on Evidence* (sec. 22).

²⁰ *Behr v. Conn. Mut. L. Ins. Co.* (2 Flipp., 692).

toppel by record, at all times technical in character, can be invoked by the defendants. It is true that the conclusive effects of judgments have been accorded and extended to the rulings of certain officials of the General Government when exercising functions which are judicial in their nature; as to the decision of the United States Commissioner of Patents in granting and extending a patent (*Providence Rubber Co. v. Goodyear*, 76 U. S., 9 Wall., 788) and to the decision of the Comptroller of the Currency upon matters within his jurisdiction in respect to the national currency (*Casey v. Galli*, 94 U. S., 673). It will be found that in such cases the statute contemplated the act of the officer as final, but the whole scope and spirit of the act to regulate commerce seems to stamp the report and order of the Commission as in no sense final in the sense that the judgment of a court is final, except where the parties impressed by the wisdom and justice of the order acquiesce therein in cases like those here under consideration. It is therefore held that nothing in the record of the Boston Chamber of Commerce cases, as compared with that of the case under consideration, estops Mr. Kemble from maintaining the complaint made by him. Not only is this believed to be a correct holding upon general principles, but it seems to be fortified by the additional consideration, that in the Boston Chamber of Commerce cases Mr. Kemble was only related to those cases as a member of that body and one of its committee, while he makes this complaint individually, and as a shipper and dealer in the character of goods which he alleges is subjected to an unreasonable and unjustly discriminative rate. The character of his relation to the cases is entirely different. In the one it is representative; in the other individual and personal."

Although there is no estoppel of record, the Commission will adhere to a previous decision unless rendered under a misconception, or there be new facts or conditions:

INSTANCE.—In *Banner M. Co. v. N. Y. C. & H. R. R. Co.* (14 I. C. C., 398) where the purpose of the complaint was to secure the benefit of decision of the Commission in previous cases, it was held, that while there is no estoppel of record in proceedings before the Commission, it must adhere to its previous conclusion, unless some new facts or changed conditions are brought to its attention, or unless it proceeded upon some misconception in reaching the original decision.

But the Commission may not consider itself bound by decisions in prior cases, involving substantially the same issues:

INSTANCE.—In *Board of R. Com. v. A. T. & S. F. R. Co.* (8 I. C. C., 304) the Commission had occasion in 1899 to consider differential rates covering the same territory that was the subject of investigation in 1890 (*Kauffman M. Co. v. Mo. P. R. Co.*, 4 I. C. C., 417). "The territory involved was identical. The differential was the same then as now. The claims of the parties upon that hearing were in no material respect different from those which have been made upon this trial. It did not appear in the present proceeding that any new conditions had come into existence, or that old conditions had been essentially modified.

"Questions coming before this body are not of a character that the decision in one case is necessarily controlling in all similar cases. Its decision can hardly be said to have the effect of an estoppel, nor is there the same reason for applying the maxim *stare decisis* which exists in courts of law. Conditions continually vary at different times and in different localities. But when in a case like this the relation in freight rates determines where and how business shall be done,

the decision of this Commission fixing or approving a given relation should only be reversed for imperative reasons. Ten years ago this differential was approved. It may well be that since then money has been invested and industries built up upon the strength of that approval. In the absence of some showing that new conditions have intervened, or that the effects of the original holdings have been other than were anticipated, we think that that case must control the disposition of this."

A decision of the Circuit Court of Appeals which involved the same set of facts but not between the same parties has not the technical effect of a previous adjudication, but it was held that it ought to be and it was considered as conclusive upon the Commission as to the questions involved and decided:

INSTANCE.—In *Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co.* (7 I. C. C., 513) where the reasonableness of a terminal charge was involved and it appeared that one of the carriers was in the hands of receivers, and a shipper had filed a petition in the circuit court alleging that the charge was illegal and asking that the receivers be directed by the court to make delivery of his commodities without the payment of the charge, and the trial court had sustained the contention of the petitioner (as well as interveners some of whom were members of the association complaining to the Commission); and the decision of the circuit court had been overruled by the Circuit Court of Appeals which reversed the judgment, the Commission held that the judgment of the Circuit Court of Appeals was in effect conclusive upon the Commission so far as the matters embraced in it were identical with the questions then before the Commission for determination. In disposing of the case the Commission said: "It can hardly be said that this decision of the Circuit Court of Appeals is to be regarded as in the nature of estoppel. Certain members of the Live Stock Exchange were parties to that suit, but the corporation itself was in no sense a party. The Cattle Raisers' Association of Texas, the original complainant in this suit, does not appear upon the record either as an association or by any of its members. While, however, it can not be treated as having the technical effect of a previous adjudication of this same question, it is a judicial decision which should be of controlling force with us. Whatever order we might make in this case can only be enforced by an application to some circuit court. Any circuit court, even though it were not within the seventh circuit, would feel bound to follow in this case the judgment of the Circuit Court of Appeals. We ought, therefore, to be controlled in the same manner and to the same extent by the judgment of that court. Whatever the views of the Commission might have been as to the questions involved, that judgment is, in effect, conclusive upon us so far as the matters embraced in it were identical with the questions presented here.

Sec. 137. Hearsay.—The strict rules of evidence respecting hearsay testimony are not enforced by the Commission, unless the source of the information be quite remote. The complainant is generally permitted to state the views of others upon the pending proposition if he knows them; the traffic manager of a commercial organization is permitted to state how the business of the several members is affected by the existing rates and practices; a defendant, although not often required to do so, may give the views of traffic managers of other railways upon the subject of inquiry, and it may introduce in evidence

statistical tables or other data made by clerks from records in its office.

The weight given to hearsay testimony naturally varies according to its reasonableness, the opportunity of witness to properly hear and understand him from whom he derived the information, the standing in the commercial or transportation world of the informer, and the probability of correct statement by the witness.

Sec. 138. Exceptions to evidence.—Exceptions to evidence avail nothing for they are not usually made the basis of proceedings subsequent to the decision of the Commission. If opposing counsel attempt to introduce testimony upon a fact which one conceives not to be relative or material, he may object to its introduction, stating his objections in the usual way, whereupon the questioner is given opportunity to state the reason for his question and the objector may reply. If it appear that the fact is or may be relevant the witness is permitted to testify.

If, subsequently, the facts thus adduced are not relevant and material one may make a motion to strike out the testimony. There is rarely a ruling upon such a motion, particularly before an examiner, and the objectionable matter is permitted to remain on the record. The object of such a motion is simply to call attention to the fact that the questioned evidence is immaterial.

Sec. 139. Documentary evidence.—In the introduction of documentary evidence the Commission is lenient concerning matters of certification and ordinarily draws no line of distinction between public or official acts, proceedings, records, and certificates and private writings and publications. The strict rules concerning authentication and production of documents and proof of execution are not followed. The same is true as to the authenticity and accuracy of maps, plats, diagrams, photographs, and other publications of a similar nature. If the counsel or the witness knows the writing or other document to be what it purports to be, or a correct copy thereof, it is received with none of the formalities required by the courts.

Sec. 140. Parol or extrinsic evidence affecting writings.—The rules of evidence applicable to the impeachment of writings²¹ by oral testimony are enforced by the Commission with the customary strictness. If a written or printed document contain scientific or technical terms, one familiar with them is permitted to explain their meaning; custom and usage may be introduced to explain a patent ambiguity, but not to overrule what is clear.

²¹ See Stephen on Evidence (art. 90), Greenleaf (sec. 85 et seq.), McKelvey (pp. 366-373), Wigmore (sec. 2400 et seq.) Hughes (Ch. IV).

The rule is thus stated by Hughes (p. 235): "Parol evidence is inadmissible to vary, add to, take from, or contradict, the terms of a document, or to modify its legal import."

The author of a letter would be permitted to explain what he meant by it if the meaning is uncertain, but not if it be clear.

Documents promulgated by a carrier for the guidance of the public and on which it must rely for information, such as a classification sheet, should be plain and definite; for the makers of it were not permitted to testify to their understanding of it:

INSTANCE.—In *Hurlburt v. L. S. & M. S. R. Co.* (2 I. C. C., 122) where the question of the construction of a classification was before the Commission, the Commission said: "A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and in connection with the rate-sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself.

"Terms of art, however, or terms peculiar to a particular occupation or business may sometimes require the evidence of experts for their full understanding, and the defense offered testimony of persons connected with transportation as to the understanding of the terms 'hub blocks' and 'hub blocks in the rough' in transportation circles; but this evidence was also rejected for the plain reason that it was not the meaning as understood in transportation circles that was in question, but the meaning accepted and acted upon in the business in which the blocks are dealt in and made use of. The classification is supposed to inform the persons engaged in that business in what classes the articles they handle are placed for transportation purposes, and it would fail to do this if instead of employing terms of designation in the sense familiar to themselves it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might to an expert in their own business be strange and misleading."

Sec. 141. Custom and usage.—It not infrequently happens that the customs and usages respecting the relations between the users of transportation agencies and the carriers have an important bearing in a case before the Commission. It may be material to show a prevailing custom or usage to justify a particular charge, or, on the other hand, to excuse it; so, also, respecting a practice. When evidence of custom or usage will be admitted in testimony, it must be proven by the usual rules of evidence applying. The Commission, however, does not look with favor upon attempts to justify or excuse charges in connection with transportation service by proving the custom or usage, holding, in general, that no charge can be made or practice indulged in not specifically mentioned in the tariffs and that all charges or practices mentioned in the tariff must be made and enforced.

Testimony concerning custom and usage is received with reluctance:

INSTANCE.—In *England v. B. & O. R. Co.* (13 I. C. C., 614) where the complainant had made arrangements for the transportation of a certain commodity and a charge for storage and insurance was made by the carrier, which charge it was con-

ceived was not authorized by the tariffs nor by the custom of the trade, evidence was adduced to show the custom, as it appeared that there was no tariff applying: "An effort was therefore made to supply the supposed deficiency by proof tending to show a custom or understanding in the grain grade with respect to storage and insurance at that point [Fairport]. This testimony was received by the Commission with reluctance and only on the theory that upon a consideration of the whole record it might in some way throw light on the controversy."

Sec. 142. Notice to produce.—The usual and customary rules²² respecting notice to produce are followed in practice before the Commission. The complainant does not, however, serve a notice to produce tariffs or schedules, for the Commission takes judicial notice of them and what they contain, they being on file in the Commission's office. In one case,²³ a notice to produce which specified various correspondence by dates and then asked for all other correspondence relating to the matter between a manager of freight traffic and an agent at a particular point was met by a counter notice asking for all correspondence between a complainant and his chief clerk, both notices were respected and all correspondence produced.

The production of voluminous records will not be ordered:

INSTANCE.—In *Mason v. C. R. I. & P. R. Co.* (12 I. C. C., 61) the Commission denied an application to produce voluminous and complicated statements and records, on the ground that it was too broad and that "it was not advised of the necessity under the issues made in the case of entering upon an examination of the records of the defendant and the car service association for so long a period."

Sec. 143. Depositions.—Depositions for use before the Interstate Commerce Commission may be taken according to the provisions of the act and the Rules of Practice. Section 12 provides:

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear

²² For rules concerning notice to produce, see Stephen (art. 72), Taylor (sec. 440 et seq.), Greenleaf (sec. 561).

²³ *Charles England & Co. v. B. & O. R. Co.* (13 I. C. C., 614).

and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be properly filed with the Commission.

The rule of practice applicable to depositions is Rule XI, see Appendix, *post*.

Upon the receipt of depositions the secretary of the Commission opens and files them as a part of the record in the case.²⁴

Depositions are subject to the rules provided by sections 863 and 864, Revised Statutes.

SEC. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

SEC. 864. Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.

Sec. 144. Ex parte affidavit.—Notwithstanding the rules of prac-

²⁴ Re Procedure in Cases at Issue (1 I. C. C., 223).

tice of the Commission permit the taking of depositions by means of written interrogatories, *ex parte* affidavits have been introduced in evidence over the objection of the adverse party.

Such testimony avails little, however, because of its nature. If the subject matter covered by the affidavit is material, the complainant should arrange to take the deposition of the witness either before, or with leave obtained, after, the hearing; if it be immaterial or cumulative the adverse party will generally admit the fact.

Sec. 145. Fees of witnesses.—Witnesses before the Commission are by section 18 of the act entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

Witnesses whose depositions are taken pursuant to the act to regulate commerce and the magistrate or other officer taking the same are severally entitled, under section 12 of the act, to the same fees as are paid for like services in the courts of the United States.

The fees of United States witnesses are fixed by section 848, Revised Statutes:

SEC. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the per diem attendance fee alone shall be taxed in the other cases in the order in which they are disposed of.

When a witness is detained in prison for want of security for his appearance he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

The customary rules concerning the tender of witnesses fees and mileage applies to witnesses before the Commission; for the purpose of making the tender at the time of the service of subpoena one usually accomplishes the service and tender through the office of the United States marshal of the district in which the hearing is to be held.

Sec. 146. Immunity of witnesses.—The immunity provisions of the interstate commerce act and similar acts are made necessary by that portion of the fifth amendment to the Constitution, reading: "Nor shall [any person] be compelled in any criminal case to be a witness against himself." Without laws giving immunity, the proper enforcement of the statutes regulating commerce would be very difficult as only those violating the laws have knowledge thereof; if such persons be permitted to plead the constitutional immunity privilege the laws would in many respects be nugatory.

The guaranty of the Constitution to the individual is the measure of the constitutionality of the laws providing for the immunity of wit-

nesses; if the statute gives immunity as broad as the constitutional provision, the requirements are met; if the immunity is anything less than given by the supreme law of the land, the statute is void. The court in *U. S. v. Armour & Co.* (142 Fed., 808) expressed the rule thus:

The fifth amendment deals with one of the most cherished rights of the American citizen, and has been construed by the courts to mean that the witness shall have the right to remain silent when questioned upon any subject where the answer would tend to incriminate him. Congress by the immunity laws in question, and each of them (immunity laws referring to investigations by the Commissioner of Corporations), has taken away the privilege contained in the amendment, and it is conceded in argument that this can not be done without giving to the citizen by way of immunity, something as broad and valuable as the privilege thus destroyed. We are not without authority on this question. By a previous act Congress undertook to take away the constitutional privilege by giving the citizen an equivalent, and the Supreme Court held in the case of *Counselman v. Hitchcock* (142 U. S., 547) that the substitute so given was not an equivalent. Then, at various times, the immunity acts in question were passed by Congress with full knowledge that in furnishing a substitute for this great right of the citizen, it must give something as broad as the privilege taken away. It might be broader, but it could not be narrower.

The statutes relating to the immunity of witnesses (other than the bankruptcy act²⁵ and section 859,²⁶ Revised Statutes, are:

(a) Section 860, Revised Statutes: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."²⁷

(b) Interstate commerce act, section 9: In actions brought for recovery of damages the court may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant to attend and testify, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence

²⁵ Sec. 7a of the bankruptcy act (30 Stat. L., 548) provides: "No testimony given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding." (See *Burrell v. Montana*, 194 U. S., 572).

²⁶ "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

²⁷ An affidavit is not "a pleading of a party" within the meaning of this section (*Tucker v. U. S.*, 151 U. S., 164). It is for the judge before whom the question arises to decide whether an answer to a question put may reasonably have a tendency to criminate the witness or to furnish proof of a link in the chain of evidence necessary to convict him of a crime (*Wycoff v. Wagner Type-writer Co.*, 99 Fed., 158). The provision of this section is not co-extensive with that of the amendment of the Constitution, as the former "does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition" (*Counselman v. Hitchcock*, 142 U. S., 547).

or testimony shall not be used against such person on the trial of any criminal proceeding.”²⁸

(c) Interstate commerce act, section 12: Where the aid of a circuit court has been invoked to compel a witness to appear and testify before the Commission, “the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.”²⁹

(d) Act of February 11, 1893: “That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled ‘An act to regulate commerce,’ approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

“Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.”³⁰

(e) Elkins law, February 19, 1903, section 3, in proceeding before the courts to compel compliance with the published rates or prevent discrimination they have power to compel the attendance of witnesses, both upon the part of the carrier

²⁸ This provision being substantially the same as section 860, Revised Statutes, the decision in *Counselman v. Hitchcock*, supra, would doubtless apply.

²⁹ This provision is unconstitutional in view of the decision in *Counselman v. Hitchcock* (142 U. S., 547) and *I. C. C. v. Brimson* (154 U. S., 480).

³⁰ The note to this Act (2 Supp. Rev. Stat. p. 80) reads: “This act supercedes, in part, that of 1891, Feb. 10, ch. 128 (1 Supp. R. S., 891).”

Its object was to obviate constitutional objections held by the Supreme Court (see 142 U. S., 547) to be fatal to previous legislation. A statute compelling a witness to give self-incriminating testimony, ‘to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates’ (142 U. S., 586). Such immunity this statute affords.”

In *Brown v. Walker* (161 U. S., 591) the court reviews numerous immunity statutes, holding that the act which satisfies the constitutional guaranty against compelling a witness in a criminal case to be a witness against himself; dissenting opinion by Shiras, Gray, White and Field, justices. This act had been held unconstitutional in *U. S. v. James* (60 Fed., 257).

The act affords absolute immunity against criminal prosecution either in the State or Federal courts for the offences to which the subject relates (*Brown v. Walker*, 161 U. S., 591).

It was held, in *Re Pooling Freights* (115 Fed., 588) that immunity under this statute is confined to the witness personally and cannot be extended to the corporation which he represents; compare provisions of act of June 30, 1906, “An act defining the right of immunity of witnesses,” etc.

and the shipper, "who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transactions; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding."⁸¹

(f) "That for the enforcement of the provisions of the act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof or supplemental thereto, and of the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, and all acts amendatory thereof or supplemental thereto, and sections seventy-three, seventy-four, seventy-five, and seventy-six of the act entitled 'An act to reduce taxation, to provide revenue for the Government, and other purposes,' approved August twenty-seventh, eighteen hundred and ninety-four * * * *Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."⁸²

(g) Act defining the right of immunity of witnesses, under various acts, approved June 30, 1906: "That under the immunity provisions in the act entitled 'An act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, * * * and in the act entitled 'An act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, * * * immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."⁸³

The passage of this act was made necessary by the decision of the Circuit Court for the Northern District of Illinois in *U. S. v. Armour & Co.* (142 Fed., 808), a criminal prosecution under the Sherman antitrust law (act of July 2, 1890); by that decision, while denying immunity to a corporation defendant on the authority of *Hale v.*

⁸¹ The immunity act of February 11, 1893, applies to cases brought under the direction of the Attorney-General in the name of the Interstate Commerce Commission, not only to actions seeking to compel obedience to the published tariffs and to prevent unjust discrimination, but also to proceedings to compel the production of books and papers. From the judgment of the circuit court in such cases an appeal lies direct to the Supreme Court (*I. C. C. v. Bond*, 194 U. S., 25).

⁸² From legislative, executive and judicial appropriation act of February 25, 1903, ch. 755. This provision may not afford immunity from prosecution in the State courts but it nevertheless satisfies the constitutional privilege against self-incrimination; the privilege against self-incrimination afforded by the Constitution is purely personal and can not be claimed by one for another or by an agent of a corporation for the corporation. (*Hale v. Henkel*, 201 U. S., 43).

⁸³ The more recent cases decided by the Supreme Court involving immunity statutes are *Hale v. Henkel* (201 U. S., 43), *Nelson v. U. S.* (201 U. S., 92), *Alexander v. U. S.* (201 U. S., 117).

Henkel (201 U. S., 43), the court gave immunity to those natural persons who did and did not supply information, to natural persons who were not served with subpoena to appear and give evidence before the Commissioner of Corporations, to whose investigations the act of February 11, 1893 (*supra*) applies.

Sec. 147. Adverse witnesses.—Practice before the Commission permits one of the parties to call a witness from the other side to give testimony concerning the issues. The complainant often places on the stand the traffic manager or other official of the defendant carrier, and the defendant may secure evidence from the complainant, if he has not testified in the case in chief. The practice of making a traffic manager of the defendant carrier a witness for the complainant is so common that it may be said to be the rule, rather than the exception. Such a witness, while called on behalf of the complainant, is not a hostile witness in the usual sense of that term; he is perhaps an adverse witness and therefore not subject to the rules which counsel is often justified in following. A traffic official has at his command a fund of information, often historical in its nature, which is of the utmost value to those charged with administering the law; he is conversant with the previous rates, or practices, when and why put in force, when and why changed, how the rate “makes” and why, and other information not available or in the possession of the users of the transportation facilities.

In appropriate cases officials from the operating or other departments of the carrier may be placed on the stand.

Such witness may be biased in judgment, or the interest he represents may be such as to affect his opinion or argument, but upon the questions of fact, whether present or past, he speaks correctly.³⁴

The defendant is at liberty to place the complainant or his employees upon the stand if it be found that he or they have information of advantage to the defendant's case; such practice is not as common as that just mentioned, but is frequently indulged in.

It results from what has been said that neither of the parties to the controversy is bound by the evidence of the witnesses as are the contestants in a court of law. One is permitted to controvert a fact testified to by one's own witness whether the witness come from the employ of the opponent or is strictly one's own witness although no surprise be urged, for after all the desideratum is the fact or facts of the case.

Sec. 148. Examination of witnesses.—The method of examination of witnesses is subject to the usual rules of practice pertaining thereto. The Commission is lenient, however, concerning leading questions and the manner in which questions are framed. The practitioner will

³⁴ Such at least has been the experience of the author.

not, however, because of the leniency, propound misleading or annoying questions or prolong the examination of witnesses by repetition.

The usual rule concerning examination and cross-examination by one counsel for each interest is adhered to, but additional counsel are frequently permitted to ask questions in order to explain on the record what appears to be uncertain or doubtful.

When one or more of the Commissioners, or an examiner, is conducting a hearing a witness is subject to examination from the bench, and even at great length; as, "in the orthodox English practice the presiding official has never ceased to perform an active and virile part as a director of the proceedings and an administrator of justice,"³⁵ so the Commission or its examiners have always considered it their duty and right to put to the witness such questions as they may deem advisable to secure the facts on which the decision of the Commission is to rest.³⁶

The interrogation of witnesses by the Commission arises from its power upon complaint "to make an investigation." The body has a duty of its own independent of the litigants and one part of that duty is to ascertain all the facts.

Sec. 149. Necessity for proof.³⁷—While the issues of a case before the Commission may be made by various methods by the pleadings, if any of the issues be of fact there is necessity for proof; if the facts be admitted, or are agreed upon, and the issue be purely one of law, no proof is required; such cases, however, are rare, for the reason that the statute prohibits unjust and unreasonable rates and undue discriminations. Whatever may technically be the function³⁸ of determining what is unreasonable or undue, whether within the province of the jury as a question of fact or within the province of the presiding judicial officer as a question of law, or a mixed question of law and fact, it is nevertheless necessary to show to the Commission, in proving that the rate is unreasonable or the discrimination undue, the effect of the rate or discrimination upon the complainant's business; discrimination may exist but it may not be such as to violate the act.

The complainant may conceive that the discrimination is so plain that it will be held undue as a matter of law. It will not ordinarily

³⁵ Wigmore, Evidence (sec. 784).

³⁶ The right of examination of witnesses by the judge was not doubted at common law; if, through ignorance, negligence or collusion of counsel the truth be not brought out it is clearly the duty of the presiding judge to secure such information, by his own examination or otherwise, as will conduce to the administration of justice (*Epps v. State*, 19 Ga., 18; *Huffman v. Cauble*, 86 Ind., 591; *Bartley v. State*, 55 Nebr., 294).

³⁷ See sec. 134 *ante*, Burden of proof.

³⁸ In *T. & P. R. Co. v. I. C. C.* (162 U. C., 197) it was held that what constitutes an undue preference or advantage under section 3 is a question of fact and not of law.

be held such if the carrier in its answer sets up facts which it alleges to justify or excuse the rate or practice. A valid justification or excuse for an admitted discrimination will prevent a decision that the discrimination is undue.

It results from what has been said that evidence is necessary in all cases unless all the facts bearing upon the question have been admitted or agreed upon.

The complete defense should be presented to the Commission:

INSTANCE.—In *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184) the Supreme Court said: "We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the circuit court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved."

Not only is there necessity for proof but there must be sufficient evidence to sustain the allegations and to warrant a finding on the facts and resulting violation of law:

INSTANCE.—In *Globe-Wernicke Co. v. B. & O. S. W. R. Co.* (11 I. C. C., 156) the evidence was insufficient, although partially convincing, to show an unlawful discrimination in classification.

In *Dewey Bros. v. B. & O. R. Co.* (11 I. C. C., 474) a complainant sought reparation but the proof was lacking in that it did not indicate definitely what was the rate charged; and in *Gallooly & Firestone v. C. H. & D. R. Co.* (11 I. C. C., 1) the evidence relating to damages sustained by the complainants was held unsatisfactory and inconclusive.

In *Raymond v. C. M. & St. P. R. Co.* (1 I. C. C., 230) it was held that rates would not be declared unreasonable and unlawful under the first section of the act without other testimony than that afforded by comparison.

In *Howell v. N. Y. L. E. & W. R. Co.* (2 I. C. C., 272) the Commission said: "It is obvious that the data furnished upon the question of whether the rate complained of is just and reasonable are exceedingly meager. The question of the reasonableness of rates is always a perplexing one. A great variety of considerations are necessarily involved in each instance. Theory and conjecture merely are not enough. A comparison of one isolated rate with another is not sufficient. The whole field must be considered in order to approximate justice, and at best the result can not be regarded as other than an approximation.

"In the present case the proofs show the volume of the business in question and the way in which it is transacted; the distances traversed and the various extraordinary expenses involved; the rates charged upon milk and cream, together with the rates charged upon four other articles of traffic. The passenger fares in force upon the defendant roads were also put in evidence, but no important relation between them and the milk rates is perceived.

"In order to arrive at a just understanding and determination of the question presented, many other lines of evidence and of comparison would be admissible, in respect to which the case is wholly barren; some of them are of great importance."

In *Rice v. A. T. & S. F. R. Co.* (4 I. C. C., 228) where "blanket rates" were complained of but the evidence was confined to points other than intermediate points, neither the complainant nor any other shipper or consignee having made any complaint or offered any evidence in the proceeding that the rates at the intermediate points were unjust or unreasonable, the Commission under the circumstances declined to determine whether the rates at the intermediate points were in any respects unjust and unreasonable, as the determination would involve "questions upon which the carriers are entitled to a hearing and to an opportunity to put in evidence, and whether investigated by the Commission upon the complaint of a shipper or consignee, or of its own motion, will also involve the taking of a great deal of evidence and enter upon an extensive field of various considerations."

In *Grain Shippers' Assn. v. I. C. R. Co.* (8 I. C. C., 158) it was held that an order granting reparation for a reasonable rate must be based upon evidence and the finding that the rate was unreasonable at the time it was paid; and where such evidence is wanting no reparation can be awarded.

In *Richmond Eltr. Co. v. P. M. R. Co.* (10 I. C. C., 629) the Commission said: "We must first inquire in this case whether complainant has submitted proofs which amount to a showing of discrimination by defendant in the provision of cars for its shipments and those of other shippers by defendant's line.

"The defendant's rule of car apportionment is that regardless of the number of carloads shippers may have ready for shipment, the first car goes to the shipper who placed the first order, the second to the second order, and so on until each day's supply is exhausted. The mere showing of such a rule and claim that it works discrimination is insufficient. The actual effect of the rule during the time covered by the complaint is necessary to a determination of the question of unfairness in the distribution of cars."

The right to give evidence and the opportunity for calling and cross-examining witnesses, even in a general investigation, are necessary for a compliance with the statute.*

Sec. 150. The evidence required in particular cases.—The evidence required in particular cases to sustain alleged violations of the act naturally varies according to the specific portion of the act on which a party relies. In some instances the character of evidence is indicated by the wording of the statute, in others by reason of the fact that the statute does not define the terms it uses, it has been left to the Commission and the courts to determine the evidence necessary. Where the Commission or the courts have indicated the points on which evidence tending to show facts must be given, it not infrequently happens that evidence which serves to prove one fact may also tend to prove another; it is therefore difficult to prescribe rules applicable to specific cases. Further, although interstate commerce cases have been before the Commission and the courts for over two decades the evidence necessary to prove specific facts has not reached

* In *Re Alleged Excessive Freight Rates, etc.* (4 I. C. C., 116).

such a stage as to be crystalized into definite rules. For this reason, it cannot now be said that the practice has reached such a degree that the nature of the evidence in a particular case is certain. As each proceeding before the Commission is more independent of those similar to it than are court cases, the evidence necessary for their determination must vary more than in law and equity causes.

EVIDENCE NECESSARY UNDER PROVISIONS OF STATUTE

We shall consider first those cases for which the statute explicitly or by implication indicates the evidence required:

(a) *In cases alleging a failure to make switch connections.*—It follows, from the language of section 1, that the defendant must be shown to be a common carrier subject to the act; that the application in writing for a switch connection has been made by a lateral, branch line of railroad or a shipper; that the applicant tendered, and probably continues to tender interstate traffic for transportation; that the physical construction is reasonably practicable and can be put in with safety; that there will be sufficient business to justify the construction and maintenance of the switch, which includes a showing as to the cost thereof.⁴⁰

(b) *In cases seeking the making of through routes and joint rates.*—If it be desired to secure a through route and joint rates,⁴¹ it is necessary to show that the carriers, subject to the act, have refused or neglected to voluntarily establish the same, and that no satisfactory through route exists; what constitutes in law, a refusal or neglect to voluntarily establish a route, has not been definitely determined, but the usual evidence required to show refusal or neglect, would, in all probability apply. The testimony concerning what constitutes a “satisfactory” route would of necessity include the service given by the existing route, whether or not it be prompt, the length thereof, delays, etc. Certain it is, whether or not a satisfactory through route exists is a question of fact and depends on the facts and circumstances of each case.⁴²

(c) *In cases to secure continuous carriage.*—The importance of the

⁴⁰ *Nield v. C. St. P., M. & O. R. Co.* 12 I. C. C., 202), *Weleetka L. & P. Co. v. F. & S. S. W. R. Co.* (12 I. C. C., 503), *McRae T. Co. v. S. R. Co.* (12 I. C. C., 270), *Barden v. S. & L. V. R. Co.* (12 I. C. C., 193), *Rahway V. R. Co. v. D. L. & W. R. Co.* (14 I. C. C., 191).

⁴¹ *Re Through Routes and Rates* (12 I. C. C., 163), *Loup Creek C. Co. v. V. R. Co.* (12 I. C. C., 471), *Birmingham P. Co. v. P. & T. R. Co.* (12 I. C. C., 29), *Cattle Raisers' Assn. v. G. H. & S. A. R. Co.* (12 I. C. C., 469), *Am. Live Stock Assn. v. T. & P. R. Co.* (12 I. C. C., 32), *Gentry v. A. T. & S. F. R. Co.* (13 I. C. C., 171), *Mehts. F. B. v. M. V. R. Co.* (13 I. C. C., 243), *Sheetman v. C. & N. W. R. Co.* (13 I. C. C., 167), *C. R. & I. C. R. & L. Co. v. C. & N. W. R. Co.* (13 I. C. C., 250), *Cardiff C. Co. v. C. & N. W. R. Co.* (13 I. C. C., 471), *Leonard v. K. C. S. R. Co.* (13 I. C. C., 573), *C. & M. E. R. Co. v. I. C. R. Co.* (13 I. C. C., 20).

⁴² *Benton Transit Co. v. B. H. St. J. R. & E. Co.* (13 I. C. C., 542).

provisions of section 7 of the act has been lessened by the provisions of the present statute respecting through routes and joint rates. Where, however, there has been an agreement between carriers in violation of section 7, there is necessity for evidence to show the contract and its terms, that it results in preventing continuous carriage of freight; the defendant may set up the equities that the public interests do not require the relief sought.⁴³

(d) *In cases seeking to compel the issuance of a receipt or bill of lading as required by section 20.*—The provisions of section 20 respecting the issuance of a receipt or bill of lading are mandatory. Whether or not the Commission has jurisdiction to prescribe a bill of lading is uncertain, although it has recommended a document.⁴⁴ If the Commission has jurisdiction in such cases, it is clear that there needs be proven that the carrier is handling the traffic named and fails to issue such a receipt or bill of lading as prescribed.

(e) *In cases to compel the publication, filing and posting of tariffs.*—Where a complaint alleges⁴⁵ that a carrier has failed to comply with the provisions of section 6, concerning the filing and posting of tariffs it is necessary to show that the carrier is subject to the act, and that the tariff is one required to be published, filed and posted, and that the carrier has failed to do so. In this connection it needs be recalled that in pursuance of the authority conferred by this section the Commission has prescribed and determined the form of schedules and by order fixed the requirements respecting publishing,⁴⁶ posting and filing of tariffs (Tariff Circulars Nos. 15-A; 16-A).

EVIDENCE NECESSARY UNDER DECISIONS WHERE STATUTE IS SILENT

It will be observed that wherever the statute uses the qualifying words "undue," "unjust," "unreasonable" and the like, it has become the duty of the Commission and the courts to interpret them and from such interpretation one must ascertain the evidence necessary to show that the subject of the complaint or investigation is within the inhibitions of the act. The evidence in such cases is indicated in the following alleged violations of the act:

(f) *In cases alleging the failure to furnish facilities for interchange of traffic.*—A complaint alleging the failure to furnish facilities for the interchange of traffic must be supported by evidence that the proposed

⁴³ Ky. & I. B. Co. v. L. & N. R. Co. (2 I. C. C., 162), on the facts of this case the circuit court held that this section had not been violated (37 Fed., 567). For other cases construing section 7, by the Commission, see section 66, *ante*.

⁴⁴ Re Bills of Lading (14 I. C. C., 346), see for carriers liability under bills of lading, Re Released Rates (13 I. C. C., 550).

⁴⁵ The petition in Am. Asphalt Assn. v. Uintah R. Co. (13 I. C. C., 196), sought the filing and publication of rates as well as other relief.

⁴⁶ The publication required by the act is for the inspection and information of the public (G. C. & S. F. R. Co. v. Hefley, 158 U. S., 101).

facilities are reasonable and proper, for only such are within the purview of the provision; "that the interests of the roads require the interchange."⁴⁷ But if it be shown that the circumstances are dissimilar, the complaining carrier is not entitled to the relief sought.⁴⁸ The burden of proof is on the petitioning carrier to show that there is a discrimination under the statute.⁴⁹

This clause is not to receive the construction as is applied to the corresponding English clause, as the provisions are not similar.⁵¹

(g) *In cases alleging a violation of the long and short haul section.*—Where a complaining shipper alleges a violation of section 4, he must prove that the carrier is subject to the act, that it charges and receives a greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer.

It needs be noted that the use of the word "line" in this section is not synonymous with "railroad; " "the use of the word 'line' is significant. Two carriers may use the same road but each has its separate line. The defendant may lease trackage rights to any other railroad company, but the joint use of the same track does not create the same line, so as to compel either company to graduate its tariff by that of the other" (C. & N. W. R. Co. v. Osborne, 52 Fed., 912).

Concerning similarity of circumstances and conditions, see *post*, this section "Applications for relief under the long and short haul section."

(h) *In applications by carriers for relief from the long and short haul section.*—In applications by carriers to the Commission for relief under the long and short haul section (sec. 4) the petitioner is under the necessity of showing that by reason of competition it is compelled to charge less for the longer than the shorter distance or lose its share of the traffic. It may be that the carrier causing the competition is not subject to the jurisdiction of the Commission, or for good business reasons, it may publish rates in conformity with the act, which would be a violation of the act by the petitioning carrier, but which the latter desires to meet.⁵²

In applications for relief under the fourth section of the act the carrier is not limited to showing substantial dissimilarity of circum-

⁴⁷ O. S. L. & U. N. R. Co. v. N. P. R. Co. (51 Fed., 465).

⁴⁸ L. R. & M. R. Co. v. St. L. S. W. R. Co. (63 Fed., 775).

⁴⁹ L. R. & M. R. Co. v. St. L. S. W. R. Co. (63 Fed., 775), O. S. L. & U. N. R. Co. v. N. P. R. Co. (51 Fed., 465).

⁵⁰ O. S. L. & U. N. R. Co. v. N. P. R. Co. (51 Fed., 465).

⁵¹ O. S. L. & U. R. Co. v. N. P. R. Co. (61 Fed., 158).

⁵² See section 66, *ante*.

stances but may present every material reason in favor of the application.⁶³

There is great difficulty in stating what constitutes "similar circumstances and conditions." The similarity must be substantial in order that the relief be granted and the similarity must be so great as to justify the greater charge for a shorter line.⁶⁴ One of the most frequent elements urged to create a dissimilarity of conditions is the existence of competition⁶⁵ between rival carriers, and it is proper to consider the interests of the public shippers, consumers and carriers.⁶⁶ The burden of proof is on the party complaining⁶⁷ but the doubt, if it exists, is to be resolved in favor of the similarity of conditions.⁶⁸

(i) *In cases to determine the just and reasonable charge to be paid by the carrier for a service performed by the shipper.*—The amendment of June 29, 1906, gave to the Commission power to determine what is a reasonable charge to be paid by the carrier for a service rendered or an instrumentality furnished by a shipper.⁶⁹ The purpose of this provision is that a system of so-called legalized rebating is said to have grown up; that industrial roads were receiving inordinate parts of the through rates, that elevators were receiving large sums for transferring and cleaning grain, and that private cars secured transportation for their owners at less than the published rates.

Where one seeks to have fixed for himself or itself, the rate to be paid for the service performed or the instrumentality furnished, it is necessary to show the cost of doing the service or furnishing the instrumentality and the value thereof to the other party. The charge must be reasonable and its reasonableness must depend on the facts and circumstances of each case. No rule of what constitutes reasonableness can be laid down for it is usually a mixed question of law and fact.⁷⁰

(j) *In cases involving unreasonable and unjust practices.*—Where one seeks relief from unreasonable or unjust regulations or practices under section 15 the testimony needs to be directed not alone to what the regulation or practice is. The mere statement of either is rarely, if ever, an indication of anything. What is required in such cases,

⁶³ R. Com. v. Clyde S. S. Co. (5 I. C. C., 324).

⁶⁴ I. C. C. v. E. T. V. & G. R. Co. (85 Fed., 107).

⁶⁵ A. T. & S. F. R. Co. v. D. & R. G. R. Co. (110 U. S., 683).

⁶⁶ L. & N. R. Co. v. Behlmer (175 U. S., 648), T. & P. R. Co. v. I. C. C., 162 U. S., 197).

⁶⁷ Junod v. C. & N. W. R. Co. (47 Fed., 290), D. G. H. & M. R. Co. v. I. C. C. (74 Fed., 839), I. C. C. v. A. T. & S. F. R. Co. (50 Fed., 295), Osborne v. C. & N. W. R. Co. (48 Fed., 49).

⁶⁸ U. P. R. Co. v. T. & P. R. Co. (31 Fed., 862), I. C. C. v. C. N. O. & T. P. R. Co. (56 Fed., 925).

⁶⁹ See suggestions to counsel for points in reargument in Matter of Allowances to Elevators (13 I. C. C., 498).

⁷⁰ Standard Oil Co. v. Van Elten (107 U. S., 325).

in addition to a description of the regulation or practice, is how it affects the parties and to what extent.

The practice may be local or be in use over a large territory; it may be of long standing or of recent invention. Though inconvenient at times it may not be onerous; though troublesome, it may not be burdensome. Though the cause of worry and annoyance, it may be necessary for the protection of the carrier and others, and not be within the inhibition that regulations or practices shall not be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial. What is said later in this section concerning the testimony necessary to show a rate unjust or unreasonable or unduly discriminatory is equally applicable to regulations and practices.

Not all practices and regulations of carriers are subject to the jurisdiction of the Commission for only those "affecting rates" can be the basis of an order.

(k) *In cases involving unjust discrimination between persons.*—The statute does not define what is meant by the term "unjust discrimination;" the Supreme Court interpreting these words in *I. C. C. v. B. & O. R. Co.* (145 U. S., 263), said:

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater compensation than for another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially the same circumstances and conditions."

In *U. S. v. Hanley* (71 Fed., 674), the court said:

The conception of discrimination necessarily involves at least two questions of shipment, one of which, in the matter of rates, has fared better than the other, though both by reason of their similitude, in those features named by the act, should have fared alike.

The evidence necessary to be adduced in order that a case of unjust discrimination may be made out results from a definition given to the term by the courts, in that there must be shown in one of two shipments that one person has paid a greater compensation for the services rendered in the transportation of property (which must be subject to the act), than another has paid for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Not only must another have paid a less compensation than the complainant, but it must have been to such an extent, under the provisions of this section, that the discrimination shall be "unjust," for only unjust and unreasonable discriminations are prohibited;^a Further, there must be shown such a similarity of circumstances and conditions, as to bring the transac-

^a *I. C. C. v. B. & O. R. Co.* (145 U. S., 263), *T. & P. R. Co. v. I. C. C.* (162 U. S., 197).

tion within the prohibition of the section, for only those discriminations are unlawful where the circumstances and conditions are similar.⁶²

Similarity of circumstances and conditions is a question of fact, to be determined upon the evidence adduced,⁶³ but competition between rival routes is not to be considered as creating substantially similar circumstances and conditions,⁶⁴ this section differing in this respect from section 4. The term "like kind of traffic," means traffic similar in character and cost of transportation, but not necessarily identically similar.⁶⁵

(1) *In cases involving the reasonableness of rates.*—There is no more difficult question to determine than whether or not a stated rate for transportation is reasonable.⁶⁶ Thoroughly sincere individuals will always differ concerning a particular rate; they may honestly differ because of their unconscious beliefs, due to their previous training or present occupation; the maker of the rate must justify it, while he who attacks it must be in a position to sustain his allegations.

⁶² I. C. C. v. B. & O. R. Co. (145 U. S., 263), T. & P. R. Co. v. I. C. C. (162 U. S., 197).

⁶³ D. G. H. & M. v. I. C. C. (74 Fed., 803).

⁶⁴ I. C. C. v. A. M. R. Co. (168 U. S., 144), Wight v. I. C. C. (167 U. S., 512). Some earlier cases indicated the contrary; I. C. C. v. L. & N. R. Co. (73 Fed., 409), T. & P. R. Co. v. I. C. C. (162 U. S., 197), I. C. C. v. B. & O. R. Co. (145 U. S., 263), I. C. C. v. T. & P. R. Co. (57 Fed., 948).

⁶⁵ N. Y. B. of T. v. P. R. Co. (4 I. C. C., 447).

⁶⁶ In the 17th Annual Report of the Interstate Commerce Commission (p. 54) it said: "It is often difficult to say what constitutes a reasonable rate, and more difficult to give in detail the reasons that lead to the conclusion reached; that although the Supreme Court of the United States had given certain rules by which to test the reasonableness of transportation charges, and although the Commission has endeavored to apply those rules, yet whenever it has interrogated railway officials as to whether or not they are governed by them making rates of transportation they have invariably answered in the negative and said that to do so would be impracticable. The carriers do not apparently possess the necessary data for that purpose, and there is at present no other source from which the Commission can obtain such data."

Addressing the Senate Committee on Interstate Commerce, S. H. Cowan of Forth Worth, Tex. (Regulation of Railway Rates, 1904-1905, Volume 1, p. 58) said: "Those who have not investigated the requirements to ascertain what is a reasonable rate have no idea of the size of the task before you. You find that you have to hear so much testimony. How would you start out to determine whether a rate is reasonable? What are the elements of reasonableness? To arrive at an ultimate intelligent judgment you must reason from details. The Supreme Court says that any calculation as to reasonableness of rates must be based on the fair value of the property. How are you to determine the value of a railroad? By what its stocks and bonds sell for? If so, the very rate itself which make the earnings of the road, would increase the value, so that the higher rate, the higher the value, and the higher the value the greater is the basis of earnings. How are you to undertake to determine what sort of a return a railroad is entitled to? Is it the rate of interest provided by the laws of the State? Is that a fair return to be expected by a reasonable man for his large investment in the railroad? What is the percentage? The Supreme Court says that a railroad is not entitled to earn merely for the purpose of paying dividends, operating expenses, interest, and fixed charges, without regard to the rights of the public. It says all things which a reasonable man would take into consideration."

The difficulty concerning the determination of the reasonableness of a rate is primarily that the question goes into the domain of possibility; the question immediately resolves itself upon the remunerativeness of the rate in the past or whether it will be remunerative in the future. The question is further complicated because of the disagreement between the courts concerning the rules which should govern the making of rates and the traffic officials, who state that the rules enunciated by the courts are not considered in the making of rates. The question is also further complicated because of the numerous theories of the political economists concerning the proper basis for the adjustment of rates. These theories are divisible into two broad lines, (a) that rates in general should be based upon the cost of transporting the traffic; (b) that rates should be based upon the value of the service (which includes the term "what the traffic will bear"). The courts lean strongly towards the former theory, while merchants and carriers lean toward the latter.

Rates alleged to be unreasonable may be such by reason of being (a) unreasonable *per se*, or (b) relatively unreasonable, and in either case it may be a single rate or a schedule of rates. No one has attempted to define a rate which is unreasonable *per se* and to mark out the rules by which proof may be had of the fact. It was said by the Commission in *Mayor, etc. v. A. T. & S. F. R. Co.* (9 I. C. C., 534), where the question of the reasonableness of a rate *per se* had been pressed upon the Commission by the complainant, that "the testimony bearing upon it (the question) is extremely unsatisfactory as it probably must be in any similar case."

The extreme limit that a rate is unreasonable *per se* doubtless is that the commodity affected by the rate does not move between the points to which the rate applies and yet the circumstances and conditions are such that one would say that the commodity should move by reason of the geographical location of the points and the character of business thereat; in such case, sincere persons will disagree as to its reasonableness. If one should attempt to prove the rate unreasonable *per se* by a mathematical process, he will find himself in a maze of cost of transporting traffic, of the actual value of the carrier's property, of capitalization, of return upon the amount invested, of volume of traffic, of length of haul, and many other elements to bewilder. If the rate is that upon a single commodity the maze is more mystifying, for should there be obtainable from statistics the cost of transportation the figure bears little or no relation to the rate under consideration.

Rates are relatively unreasonable, either by reason of the classification or by reason of the relation between the commodity rate or the class rate or by reason of an alleged discrimination between localities.

Evidence tending to show relative unreasonableness is more available, because immediately there arises the question of comparison, itself an element of reasonableness. The essence of reasonableness of a particular fact is a comparison of that fact with a reasonable fact. One therefore is permitted to compare the rate or classification of the commodity under consideration with other rates and classifications of commodities used for similar purposes, preferably moving in the same volume and upon the same line of railroad, or upon other lines of railroad.⁶⁷ The nearer identical the elements the greater must be the weight of the evidence.

The basis of calculation as to the reasonableness of railroad rates was laid down by the Supreme Court in 1898 and it has since followed the rule there prescribed; in *Smyth v. Ames* (169 U. S., 466) the court said:

We hold, however, that the basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

Where a carrier is engaged in the transportation of both interstate and intrastate traffic the reasonableness of a particular rate or schedule of rates cannot be predicated upon the entire traffic. There must be a separation of the two kinds of traffic, for it is not proper that one should bear the burden of the other. In a recent case⁶⁸ involving the reasonableness of rates prescribed by legislature the court said:

A State can not justify unreasonably low rates for domestic transportation considered alone upon the ground that the carrier is earning large profits upon interstate business, over which, so far as the rates are concerned, the State has no control, nor can the carrier justify unreasonably high rates on domestic business on the ground that it will be able, in that way, to meet the losses on its interstate business. Domestic and interstate commerce, and the value of the property so devoted, must be kept separate in determining reasonableness of rates for domestic commerce.

⁶⁷ That carriers may be so far dissimilar that no comparison of rates on them can be made, see *Am. Asphalt Assn. v. Uintah R. Co.* (13 I. C. C., 196).

⁶⁸ *S. A. L. R. Co. v. R. Com.* (155 Fed., 792).

Where an advance in rates is complained of the testimony takes a broad scope:

INSTANCE.—In *Central Yellow Pine Assn. v. I. C. R. Co.* (10 I. C. C., 505) the report of the Commission considered: (a) the association, its objects, and the occupation of its members; (b) the defendants and their location and business in the transportation of lumber; (c) the lumber-producing districts involved in the complaint; (d) the advance complained of and where effective; (e) the rates from several points to several points, the latter being markets; (f) the divisions allowed the originating roads and the revenue earned by them; (g) the history of the fluctuation in lumber rates; (h) the situation of mills for the manufacture of lumber; (i) the history of the lumber traffic from the particular producing section; (j) the volume of lumber annually shipped from the producing section; (k) the amount of the advance per car and its effect in currency on the business of the mills; (l) prices for various cars of lumber at several markets; (m) the cost of manufacturing lumber and the capital invested at several mills; (n) the depreciation of mill property; (o) the increase in price of material, equipment and wages of the defendants, and the wages of mill employees; (p) the operating expense of the carriers, including gross earnings, total operating expenses, percentage of operating expenses, earnings, net earnings, net earnings per mile of road and total mileage operated; (q) the profit to the carriers under prior rates; (r) the capitalization, funded debt, and cost of construction of the carriers including dividends paid by them for a series of years; (s) the equipment of the carriers (cars and terminals) for handling traffic; (t) the character of car required for the commodity; (u) the average loading of cars and the capacity loading, and (v) the total lumber tonnage of the United States and a comparison with the tonnage with other commodities heavy in volume.

The evidence necessary in a case involving the reasonableness of a rate on a single commodity between given places is indicated by the points considered in the opinion of the Commission in *Am. Asphalt Assn. v. Uintah R. Co.* (13 I. C. C., 196). The question involved the rate on gilsonite from Dragon, Utah, to Mack, Colorado. While the question turned almost exclusively upon the remunerativeness to the carrier of the property used for the convenience of the public the Commission considered:

(a) the ownership of the defendant carrier; (b) the business occupation of the owners of the defendant; (c) the occupation of the complainant; (d) the character of the commodity, its use, where found, and the method of mining and transportation; (e) the reasons for constructing the defendant carrier, as it was constructed for the special purpose of transporting gilsonite; (f) the physical characteristics of the country through which the road runs, the method of construction, including grades and curves and its freight equipment; (g) that after the construction of the road it secured other freight than for the handling of which it was constructed; (h) whether or not a rate of 50 cents per 100 pounds for a 54 mile haul is inherently extortionate for a low grade commodity; (i) the competitive traffic at points along the line of the defendant; (j) that the transportation of gilsonite moved only in one direction; (k) the original cost of the carrier compared with the cost of reconstruction; and (l) its earnings and expenses showing a net income of about 7 per cent.

In considering the value of the services to the shipper it is improper to measure it by the cost to the shipper of performing the service:

INSTANCE.—In *Am. Asphalt Assn. v. Uintah R. Co.* (13 I. C. C., 196) the Commission said: "It is often said that the rate depends upon the value of the service to the shipper, and it has been frequently claimed before this Commission that the cost of performing the service by the shipper himself might be taken as a measure of the rate to be charged by the carrier. It is seldom proper to measure the reasonableness of a freight charge by what it would cost the shipper to perform the service himself by other means; for railroads have become a part of a commercial and industrial whole, and must be reckoned as such in considering what may be properly charged for their services."

(m) *In cases involving the classification of freight.*—Cases involving the classification of commodities for the purpose of ascertaining the rates to be applied in their transportation may fall at least under two heads: (a) similar or substantially the same articles being classed in different classes when it is alleged that they should be all placed in the same class, as in *Stowe-Fuller Co. v. P. Co.* (12 I. C. C., 215); or (b) where it is claimed that a commodity is not properly classified in that it does not bear the proper relation and hence the correct relative rate to articles in the same and other classes, as in *National Hay Assn. v. L. S. & M. S. R. Co.* (9 I. C. C., 264), or *Proctor & Gamble v. C. H. & D. R. Co.* (9 I. C. C., 440).

In the first class of cases no other evidence is required than to show that the articles in different classes are so near alike, of the same size, loading and the same weight that the carrier is not justified in distinguishing between commodities in the classification:

INSTANCE.—In *Stowe-Fuller Co. v. P. Co.* (12 I. C. C., 215), where it appeared that there was no real distinction between fire, building, and paving bricks, except in their uses, the carrier was not justified in making any difference in the rates upon them. The Commission said: "Classification must be based upon a real distinction from the transportation standpoint; we can find no such distinction between these three classes of brick, which are made of the same material and come out of the same kiln as justifies the difference in rates."

In the second class of cases it is proper, and generally required, to introduce more elaborate evidence. Such evidence will of necessity fall under the heads to be considered in determining into which class a particular commodity should be placed. In *Proctor & Gamble Co. v. C. H. & D. R. Co.* (9 I. C. C., 440) the Commission said: "Freight classification is based upon the relation which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage of volume, risk, cost of carriage, ease of handling and controlling conditions caused by competition."

It will be observed that under these heads the testimony may, and generally does, have a wide range, covering broadly every material and pertinent fact which may influence the transportation of the commodity:

INSTANCE.—In *National Hay Assn. v. L. S. & M. S. R. Co.* (9 I. C. C., 264)

the Commission considered: (a) the complaining association, its incorporation, its membership, their occupation and the relation which they individually bore to the producer and consumer of the article involved; (b) the defendants, the territory covered by their classification, and that the classification was changed by the concerted action of them; (c) the history of the classification in the particular territory, with a description of the several classes, and how a classification affects rates; (d) the volume of tonnage used at several centers, and the amount of hay imported for a series of years prior and subsequent to the date on which the classification complained of took effect; (e) the change per unit of sale of the commodity as affected by the change in the classification; (f) the localities producing hay for transportation and the localities under the necessity of purchasing same; (g) the comparison of the classification under consideration with the classifications in other parts of the country; (h) the method of baling hay for transportation and the carting thereof; (i) the volume and value of the hay crop of the country for a number of years and of particular localities; (j) the prices for a series of years in a stable market, and the cost of marketing; (k) the purpose for which hay is used, and whether or not other articles may be substituted for it; (l) the comparison of the articles in the same present class with hay and the articles in the class in which hay formerly was; (m) the articles and minimum weights which were advanced by the same classification as changed the classification of hay; (n) the total change on hay transported in the United States; (o) the element of risk to the carriers; (p) the detention of cars in loading and unloading hay and a comparison of this detention with cars laden with other commodities; (q) the minimum weight provided in the classification and the capability of heavier loading; (r) a comparison of the movement of grain and grain products with that of hay; (s) average revenue per car for hay and other commodities; the earnings per car mile and the dead weight per car of hay and grain; (t) the ability of the carriers at all times to carry all commodities offered including a possible preference given to good paying freight; (u) the rates per ton per mile from several shipping stations to a stable market; (v) the defense that there had been an increase in price of lumber and other articles used in railway construction, and maintenance and in labor; (w) the average earnings per mile of line in the territory covered by the classification, with a consideration of the average per ton per mile rate for the United States for a series of years; (x) the earnings of the several carriers and the rate of interest paid by them for a series of years.

(n) *In cases involving undue or unreasonable prejudice or disadvantage to localities.*—In cases brought under section 3, alleging undue or unreasonable prejudice or disadvantage against localities it is proper to submit the same evidence as in cases involving the relative reasonableness of rates (*supra*, this section, subdivision l) and the relative geographical location, the number and character of the carriers and water competition at the complaining place as compared with the place alleged to have an undue preference or advantage.

(o) *In cases involving undue prejudice or disadvantage to particular descriptions of traffic.*—The evidence necessary to be adduced in cases involving undue prejudice or disadvantage to particular descriptions of traffic necessarily requires testimony comparing all of the supposed advantages and preferences of one class or kind of traffic to all the supposed disadvantages or prejudices of the other kind of traffic.

(p) *In reparation cases.*—In reparation cases the evidence necessary to support any of the particular cases above referred to must be introduced and as well evidence to show the amount of damage to the complainant. In cases involving unreasonable rates the amount of reparation is computed on the difference between the rate charged and the rate found reasonable on the shipments which actually moved; in cases involving discriminations and prejudice and advantage, the usual rules respecting evidence in cases seeking unliquidated damages, with such modifications as the nature of the proceeding warrants, will serve as guides.

EVIDENCE IN GENERAL INVESTIGATIONS

In general investigations by the Interstate Commerce Commission under the authority conferred by the act to regulate commerce^o the range of evidence therein is marked out by the order therefor. If, during the hearings there is evidence which requires the examination of witnesses upon collateral subjects, it has been the custom for the Commission to seek evidence respecting such matters. The power of the Commission to secure evidence in the course of general investigations was recently considered by the Supreme Court in *Harriman v. I. C. C.* (No. 315, October Term, 1908, decided December 15, 1908). An order had been issued for a general investigation respecting the consolidations and combinations of carriers; during one of the hearings certain questions were propounded the witness, Harriman; these questions related to his ownership of stock in competing and noncompeting carriers, which questions on the advice of counsel he declined to answer. The Supreme Court said:

The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. * * *

The Commission it will be seen is given power to require the testimony of witnesses "for the purposes of this act." The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by section 12; that another is that it shall recommend additional legislation under section 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

^o See sec. 33. *ante*.

We are of the opinion on the contrary that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of complaint. * * * The power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law. * * *

If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasijudicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from sections 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

It seems therefore that the power of the Interstate Commerce Commission respecting securing evidence in general investigations is to be confined to such evidence as would be included in alleged violations of the act and that general investigations must be confined to matters that may be made the object of a complaint.

IN SPECIAL INVESTIGATIONS

In special investigations made by the Interstate Commerce Commission pursuant to legislative resolutions the scope of the evidence must be ascertained from the authority conveying power to make the investigations.

IN INFORMAL COMPLAINTS

Strictly speaking there is no evidence in informal complaints, both the shipper and carrier stating the facts and arguments of the cause of complaint and the defense.

CHAPTER VIII

PROCEEDINGS AFTER ORDER

Sec. 151. Proceedings after order.—If a party be dissatisfied with the order issued by the Commission¹ the right to subsequent proceedings is dependent upon the character of the order and in whose favor it is issued. The statute is wanting in mutuality concerning proceedings after final disposition of a case by the Commission; either party to a proceeding may apply for a rehearing, but when this has been denied the defeated complainant has no further remedy provided for him by the statute while the defeated defendant carrier is provided a remedy whereby the decision of the Commission may be reviewed.

Sec. 152. Rehearings.—Whatever the character of order, if one determine to undertake subsequent proceedings it is proper, under the familiar rule that one ought to exhaust his remedy in the tribunal of first instance before proceeding by way of appeal or review, to apply for a rehearing. Rehearings are provided for by section 16a²—a part of the act of June 29, 1906.³ Previous to the passage of this act no power had been given the Commission to grant rehearings.⁴

Rehearings may be applied for by any party to the proceeding and the application may request rehearing of the entire case or any matter determined therein. The statute permits the Commission in its discretion⁵ to grant a rehearing if a sufficient reason be made to appear.

The application for rehearing does not act as a stay or excuse the defendant from complying with or obeying the order or requirement of the Commission, nor does the application postpone the enforcement of the order unless the Commission so direct.

¹ For kinds of orders which the Commission may issue, see section 35, *ante*.

² Appendix.

³ 34 Stat. L., 584.

⁴ But the Commission under the former act permitted rehearings; for example see *Riddle, Dean & Co. v. P. & L. E. R. Co.* (1 I. C. C., 490).

⁵ The object of granting new trials at common law applies to rehearings before the Commission. In *Bright v. Eynon* (1 Burr., 395) Lord Mansfield said: "The rule laid down by Lord Parker, in the case of *Reg. v. Helston*, H. 12 Ann. B. R. (Lucas's Rep., 202), seems to be the best general rule that can be laid down upon this subject, viz., 'doing justice to the party,' or, in other words, 'attaining the justice of the case.' The reasons for granting a new trial must be collected from the whole evidence, and from the nature of the case considered under all its circumstances."

The statute gives to the Commission power to establish general rules to govern rehearings. Under such powers the Commission has established a rule of practice relating to rehearings (Rule XV, Appendix). The Commission has interpreted the term "rehearing" to include two methods of reconsideration: (a) a reopening of the case for the purpose of introducing additional evidence, and (b), a rehearing in the nature of a reargument to correct alleged errors of findings of fact or conclusions of law. Applications for rehearing must be in writing; no oral argument thereon is provided for.

In either case a petition is filed and, if it is for a reopening of the case and it be desired to introduce the additional evidence, the nature and purpose of such evidence must be stated; the evidence must be of such character as will tend to controvert the findings of fact, thereby changing the conclusions of law, for mere cumulative evidence will not be deemed sufficient ground to reopen a case. Should the application be for a rehearing in the nature of a reargument, the practitioner will specify such errors as he would in an action of law; as elsewhere stated, however, exceptions to evidence avail nothing and one is compelled to take the record broadly if the error be one for alleged introduction of evidence which ought not to have been received or the rejection of evidence which ought to have been admitted.

If the purpose of the application be to introduce evidence tending to show a change of circumstances and conditions arising subsequently to the argument, or seek the promulgation of an order for the purpose of modifying the decision, order or requirement, or reversing it, one must set forth such matter as is relied upon fully and completely; although the rules do not so provide, perhaps such application should be verified in order that the *bona fides* of the application may be apparent. Rehearings of this kind may be granted in appropriate cases before a decision.

Rehearings will not be granted where evidence is cumulative or where reargument would not change the result:

INSTANCE.—In *Riddle, Dean & Co. v. P. & L. E. R. Co.* (1 I. C. C., 490) upon application for a rehearing the Commission said:

"We have carefully considered the application made in the brief of petitioners' counsel for a rehearing in this proceeding, and are constrained to deny it on the ground that no argument of counsel upon the evidence could change the result announced in our previous report and opinion by which the petition was dismissed. We feel it to be due to candor as well as justice to say that a reargument by the counsel of the parties upon a rehearing would be a mere waste of time in addition to the unnecessary expense it would cause the parties and the useless labor it would entail upon their counsel. If, upon the whole evidence, we could see it was possible that any argument of counsel could change the result we would unhesitatingly grant the application for a rehearing.

"The main, controlling and general grounds upon which we decided to dismiss the petition, as set forth in our report and opinion, are not controverted or

questioned in the application for a rehearing, nor, indeed, do we see how they could be, but several particulars are mentioned in which it is claimed we were mistaken in our findings upon the evidence. Two of these we notice briefly, the others having been disposed of in our previous report and opinion in accordance with the weight of the evidence. * * * As this is the first application we have had for a rehearing, it may also not be improper for us to state in this connection, as every one of our reports and opinions will show upon its face, that in every case before us our findings upon the evidence relate only to the ascertainment of all the material facts necessary to fairly and justly present the merits of the controversy, and that to such facts as arise from immaterial or irrelevant evidence we give them no place in our reports and opinions. To do otherwise would be to make a book out of a case like the present, which contains more than 300 pages of printed evidence and equally as much of written manuscript, and would accomplish no useful or just purpose whatever.

“Where the delinquency charged is in the nature of a fraud, as in the present case, under the rules of law a wide range is allowed in the evidence that the complainants may, if they can, show the existence of the fraud, barricaded as it may be by devices, inventions, subterfuges or pretences, and it is indispensable to truth and justice that such latitude should be allowed. The party accused must in fairness and justice be allowed a correspondingly wide latitude in the evidence to show innocence of the fraud imputed to him. A great mass of evidence is the result. Some of it is merely circumstantial; some of it is unavoidably cumulative; other portions of it would be wholly irrelevant if not inseparably connected with some fact that is relevant; much of it is immaterial; large portions of it are explanatory, and thus it is presented in oral examinations, depositions, and documentary evidence.

“Under such circumstances when we have patiently and laboriously sifted out all the material facts necessary to fairly and justly present the merits of the controversy, with our conclusions thereon, we have done all that the statute authorizes or requires us to do. The statute deals with the substance of things, and contemplates, as far as this is possible, methods of procedure that are speedy and which come at once to the very right of questions rising in the transportation of persons and freight; and while in its administration we will always cheerfully and carefully examine and consider all applications for rehearings by a party to any proceeding decided by us who will point out any errors he may think we may have committed, either of law or fact, with a view to their prompt correction, if found to exist, yet we will not in any proceeding direct a rehearing involving the expense to parties of appearing before us for a reargument of the case and the further consumption of time on our part, which belongs to the public, unless satisfied that such reargument might have the effect of changing the result of what we have already done.” Application denied.

A petition to reopen a case for further testimony and rehearing should be verified and indicate the nature of the new testimony and its purpose.”

Where upon a complaint with liberal proceedings and proof there has been a determination by the Commission and parties to the record have not applied for a rehearing the Commission will not grant an application made by others not parties to the proceeding; but

* *Rice R. & W. v. W. N. Y. & P. R. Co.* (3 I. C. C., 87), the petition must show *prima facie* that material testimony has been overlooked or misapprehended. (*Proctor & Gamble v. C. C. & St. L. R. Co.*, 4 I. C. C., 443; *Myers v. Pa. Co.*, 3 I. C. C., 130; *Bishop v. Duval, receiver*, 3 I. C. C., 128).

should another case be filed, and the Commission's decision in the first case be proved erroneous in any particular the Commission will feel it to be a duty to correct its conclusion.⁷ A general investigation, however, was reopened upon a petition for rehearing by mercantile organizations, it being claimed that the prior opinion was unfair.⁸

And when a question of general public interest is involved, the Commission in its discretion and for the furtherance of justice may reopen a case to give to the parties the benefit of a more extended investigation.⁹

The Commission is not liberal in granting applications for a rehearing, such errors must be shown as will clearly indicate that the decision of the Commission is incorrect.¹⁰

Sec. 153. Modification of orders.—While the Commission exercised authority to modify its orders prior to the passage of the act of June 29, 1906, it is given specific power to do so by that act.

Section 15 provides that orders other than orders for the payment of money shall continue in force and effect for a specific period of time "unless the same shall be suspended or modified or set aside by the Commission."

The reasons for the modification of an order, upon application of one of the parties to a proceeding, should be equally cogent as an application for a rehearing. The most frequent modification of orders is in respect to the time when they shall take effect, although orders have been modified to the extent of materially changing a previous decision of the Commission.

The power of the Commission is not exhausted by having once passed upon a question:

INSTANCE.—In *Cattle Raisers' Assn. v. C. B. & Q. R. Co.* (11 I. C. C., 277) where it was urged that the Commission having once passed upon a question its power had been exhausted, the Commission, after reviewing cases, said to be authority for the contention that boards of audit, supervisors, commissioners for the assessment of damages, and the like, having once acted upon a given matter and published their decision according to the statute creating them, they could not reconsider that action (and particularly *Union Terminal R. Co. v. Board of R. Commissioners*, 54 Kan., 352), said:

"The statute provides that this Commission may make rules for the conduct of its business, and the court will hardly presume to dictate as to those rules, so long as the rights of all parties are protected. In the matter before us every reason of convenience requires that the case should be reopened. A great mass of testimony has been taken, the questions at issue have been elaborately argued, voluminous facts have been found—all of which must be done over if a new com-

⁷ Re petition Produce Ex. (2 I. C. C., 588). Compare Section 136 for the doctrine of *stare decisis*.

⁸ Re Allowance to Elevators (13 I. C. C., 498).

⁹ *Rice R. & W. v. W. N. Y. & P. R. Co.* (3 I. C. C., 87).

¹⁰ *Randolph L. Co. v. S. A. L. R. Co.* (14 I. C. C., 338) where rehearing on the application of a defendant was denied; *Hussey v. C. R. I. & P. R. Co.* (14 I. C. C., 215), where motion for rehearing made by a complainant after order dismissing complaint was denied.

plaint is filed. We are unable to perceive how the rights or interests of these carriers can be in the slightest degree prejudiced by reopening this case, instead of beginning a new one. In several instances, where the suit to enforce an order has been dismissed, the Supreme Court of the United States has expressly said that the Commission might proceed upon the record already before it, either with or without additional testimony, thereby recognizing the propriety of such a method of procedure. *L. & N. R. Co. v. Behlmer* (175 U. S. 648), *I. C. C. v. Clyde S. S. Co.* (181 U. S., 29), *E. T. V. & G. R. Co. v. I. C. C.* (181 U. S., 1).

The pendency of a suit involving similar issues before a court is not sufficient to warrant a modification of an order, but upon decision by the court leave will be granted to either party to apply for a modification of the order, and if necessary the order will be modified to meet the judgment of the court.¹¹

Sec. 154. Proceedings after order granting relief.—

ORDERS AWARDING REPARATION

If the order of the Commission awards reparation and the carrier does not satisfy the order within the time mentioned therein the original complainant, or any person for whose benefit the order was made, is authorized under section 16 to file in the circuit court of the United States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises.

ORDERS OTHER THAN FOR THE PAYMENT OF MONEY.

Orders other than for the payment of money made under the provisions of section 16 are enforceable by application made, either by the Commission or by any party injured by the failure to obey the order, to the circuit court in the district where such carrier has its principal operating office or in which the violation or disobedience of such order shall happen. This was formerly the only procedure where a carrier failed or neglected to obey an order.

By the act of June 29, 1906 (sec. 16) the carrier may institute a suit in the circuit court to enjoin, set aside, annul or suspend an order or requirement of the Commission in the district where the carrier against whom the order or requirement was made has its principal operating office; such suits may be brought at any time after the order is promulgated.¹²

¹¹ *Keith v. K. C. R. Co.* (1 I. C. C., 189), see also *Cattle Raisers' Assn. v. Ft. W. & D. C. R. Co.* (7 I. C. C., 513).

¹² As failure or refusal to obey an order of the Commission, other than for the payment of money, subjects the offending carrier to the penalties of the act, namely, suits to enjoin, set aside or annul an order or requirement of the Commission, are the usual method of staying the operation of the order; the prac-

Sec. 155. Proceedings after order dismissing the petition.—As has been seen,¹⁵ orders dismissing the petition may be (a) dismissing the petition, (b) dismissing the petition without prejudice, of which there are two kinds—i. e., “dismissed without prejudice to the rights of complainant, or any other person to file a complaint alleging,” substantially the same cause of action if the alleged unreasonable rate or practice shall be of consequence,¹⁶ and “that the complaint in this hearing be, and is hereby dismissed without prejudice.”¹⁷

The statute points out no way by which the defeated complainant may have a review or appeal of his case other than by a rehearing. If this be denied he is, as far as the statute is concerned, remediless. If the petition be dismissed without prejudice, and should the circumstances warrant, he might file another petition; or, if the effect of an order dismissing without prejudice is the usual effect of such orders or decrees,¹⁸ and the right be predicated upon section 8 of the act, the complainant would doubtless be entitled to proceed in the courts as provided in section 9 of the act.

However seriously aggrieved the complainant may be whose petition has been finally dismissed, the statute gives him no further remedy. He may consider errors both of law and fact to be serious. It may be that the petition has been dismissed for the want of jurisdiction, or he may desire to raise a constitutional question, or he may conceive that the errors in admitting and rejecting evidence are such that but for the rulings of the Commission he would be entitled to relief. This want of mutuality in providing for subsequent proceedings leads to speculation upon the constitutionality of the act. It has been suggested that the complainant whose petition has been dismissed may have a remedy in equity by filing a bill in the nature of a bill to review an erroneous decree.¹⁹

tice is to file a bill before the date on which the order becomes effective and give notice of hearing of an application for an injunction. For list of cases filed to set aside the orders of the Commission see sec. 165, *post*.

¹⁵ Sec. 35, *ante*.

¹⁶ *Harrell v. M. K. & T. R. Co.* (12 I. C. C., 28).

¹⁷ *Johnston-Larimer D. G. Co., v. W. R. Co.* (12 I. C. C., 52). A complaint may be dismissed “without prejudice to the defendant’s right to apply for relief under the fourth section in a case justifying such action” (*Behlmer v. M. & C. R. Co.*, 6 I. C. C., 257).

¹⁸ The right to proceed after dismissal without prejudice has not been definitely determined. In equity practice a decree dismissing a bill in a former suit is an adjudication of the merits of the controversy and constitutes a bar to any further litigation of the same subject between the same parties; if there be words of qualification, such as “without prejudice” there is indicated the right or privilege to take further legal proceedings on the subject (*Durant v. Essex Co.*, 74 U. S., 107; *Co. of Mobile v. Kimball*, 102 U. S., 705). In the last case it was said that a bill dismissed without prejudice is “a condition which prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill.”

¹⁹ While this suggestion has been made the author does not concede that such a right exists.

It is suggested that such an one may have a right to review the proceedings of the Commission by certiorari in the Supreme Court of the District of Columbia.¹⁸

¹⁸ As the Interstate Commerce Commission is an administrative board, exercising quasijudicial functions (sec. 23), it is in its nature an inferior court; the Supreme Court of the District of Columbia is a court of the United States (sec. 61, Code of the District of Columbia), and has the power to exercise all the jurisdiction of a common law court, and, in addition, the power conferred by acts of Congress, and is authorized to issue writs known to the common law and equity practice.

The writ of certiorari has been used in numerous instances to bring before this court the records of municipal (District of Columbia) and United States officers whose functions are judicial, or quasijudicial. It has been invoked for the cancellation of tax assessments, for the review of the proceedings before a police trial board, to review the proceedings of the board of medical examiners of the United States Army, proceedings of a board of health which had condemned a soap factory as a nuisance and similar purposes.

The leading reported cases are: *McPherson v. Gallagan* (1 H. & H., 394), *Blagden v. Broadrup* (2 H. & H., 278), *Bates v. D. C.* (1 MacA., 423), *Washington Market Co. v. Summy* (3 MacA., 59), *Henry Hoiles v. U. S.* (3 MacA., 370), *Maxwell v. Creswell* (3 MacA., 374), *D. C. v. Washington Gas-Light Co.* (3 Mackey, 343), *Wood v. D. C.* (6 Mackey, 142), *Barber v. Harris* (6 Mackey, 586), *Great Falls Ice Company v. D. C.* (19 D. C., 327), *D. C. v. Burgdorf* (6 App. D. C., 465), *Hendley v. Clark* (8 App. D. C., 165), *D. C. v. Libby* (9 App. D. C., 321), *Bradshaw v. Earnshaw* (11 App. D. C., 495), *U. S. v. Mills* (8 App. D. C., 500), *Bond v. Hardware Co.* (15 App. D. C., 72), *Anderson v. Morton* (23 App. D. C., 445), *Chamberlain v. Edwards* (18 App. D. C., 332), *Bradford v. Brown* (22 App. D. C., 445), *Brown v. Slater* (23 App. D. C., 51), *Sullivan v. D. C.* (19 App. D. C., 210), *Kelly v. Moore* (22 App. D. C., 1), *Padgett v. D. C.* (17 App. D. C., 255), *Williams v. Satterlee* (20 App. D. C., 393), *Capital Traction Co. v. Hoff* (174 U. S., 1).

The leading case in Maryland (from which the Supreme Court of the District of Columbia derived its early jurisdiction which it retains) is *Williamson v. Carman* (1 G. & J., 184).

The following principles were there adjudged and settled by the Baltimore County Court:

"1. That every inferior jurisdiction, whether created by public or private law, is subject to have its proceedings inspected either by appeal or by certiorari and mandamus where such jurisdiction acts judicially (1 Salk., 146; 1 Ld. Raym., 580). They will be coerced to perform their duties, and restrained and confined within their proper limits as prescribed by law.

"2. That where these jurisdictions act in a summary manner, or in a new course different from the common law, a certiorari is the peculiar and appropriate remedy; as in such a case a writ of error will not lie (*Greenvelt v. Burrell*, 1 Salk., 263; *Com. Rep.*, 76; *Israel v. Allen*, decided in Baltimore County Court).

"3. That a certiorari does not go to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds (2 Burr, 1042).

"4. That certiorari will lie, after judgment, where the jurisdiction proceeds in a summary manner, and in a course different from the common law (1 Salk., 263; *Com. Dig.*, 76; 2 Burr, 1042).

"5. That a certiorari may issue even after judgment executed, where a limited authority has been transcended by inferior jurisdictions, in cases where no writ of error lies, for the purpose of questioning their proceedings."

PART II

Procedure Before the Courts

CHAPTER IX

JURISDICTION OF COURTS IN INTERSTATE COMMERCE

Sec. 156. Jurisdiction of Federal courts.—It is not within the scope of this work to refer to the general jurisdiction of Federal courts, at law or in equity, but the reader is referred to the general works on the subject.¹ The jurisdiction to hear and determine matters involving interstate commerce will be considered, whether that jurisdiction be conferred by the judiciary acts² or by the acts having for their purpose the regulation of commerce. Whatever statute may confer jurisdiction on the particular Federal court, it needs to be remembered that its jurisdiction and its powers are derived from the Constitution and the acts of the Congress,³ and that they exercise no common-law authority, although it is proper for them in interpreting and construing laws to be controlled by the rules of the common law in that behalf.

Sec. 157. Equitable jurisdiction of Federal courts to protect interstate commerce.—Independent of the act to regulate commerce the Federal courts have jurisdiction sitting in equity to protect interstate commerce, whether upon application of the United States or upon the application of carriers engaged therein. This jurisdiction is conferred by the several judiciary acts and extends to rights affecting interstate commerce not covered by the act to regulate commerce; it is the broad, general chancery jurisdiction of Federal courts.

¹ Brown on Jurisdiction; Carter on Jurisdiction of Federal Courts; Curtis on Jurisdiction and Jurisprudence; Hughes on Federal Jurisdiction and Procedure; Works on Courts and their jurisdiction.

² The general judiciary acts are sections 629-657 R. S.; Act of March 1, 1875 (18 Stat. L., 335); Act of March 3, 1887 (24 Stat. L., 552); Act of August 13, 1888 (25 Stat. L., 433). The statutes specifically giving jurisdiction in interstate commerce matters embrace all the so-called interstate commerce acts—i. e., Act of February 4, 1887 (24 Stat. L., 379); Act of March 2, 1889 (25 Stat. L., 855), Act of February 19, 1903 (32 Stat. L., 847), Act of June 29, 1906 (34 Stat. L., 584). For acts giving jurisdiction in other special cases, see Dewhurst on Rules of Practice in the United States Courts, p. 293.

³ In *Rice v. M. & N. R. Co.* (1 Black, 358) the Supreme Court said: "Jurisdiction, in common law cases, can never be exercised in the Federal courts, unless conferred by an act of Congress, because such courts are courts of special jurisdiction, and derive all their powers from the Constitution, and the laws of Congress passed in pursuance thereof. Rules of decision, also, in cases within the thirty-fourth section of the judiciary act, are derived from the laws of the States; but in the construction of the laws of Congress, the rules of the common law furnish the true guide."

The Federal courts have jurisdiction to protect commerce at the suit of the United States:

INSTANCE.—In *re Debs* (158 U. S., 582), the Supreme Court said: "Every Government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrong doing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

But not to enjoin at the request of the Interstate Commerce Commission discriminations prohibited by the act to regulate commerce, as it existed prior to the Elkins law:

INSTANCE.—In *M. P. R. Co. v. U. S.* (189 U. S., 283), where a bill had been filed in the circuit court at the request of the Interstate Commerce Commission in the name of the United States, and the authority to file the same had been sustained by the circuit court and the Circuit Court of Appeals, the case was reversed and remanded by the Supreme Court, saying: "Bearing in mind that, prior to the request of the Commission upon which the suit was brought, no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the Commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the Commission were authorized to institute this suit.

"Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist."

Shortly prior to this decision the Elkins law was passed and while section 3 of that act gives to the Commission authority to apply to the courts for an injunction against discriminations and transporting goods at less than the published rates, it speaks in the present, as "is committing," and that the court may direct a "discontinuance," it is doubtful if the circuit courts have jurisdiction, or the Commission authority, to file a bill to prevent a discrimination not in existence at the time of the filing of the bill or to prevent threatened transportation of goods at less than the published rates.

The Federal courts have jurisdiction to protect commerce at the suit of carriers of interstate commerce:

INSTANCE.—In *T. A. A. & N. M. R. Co. v. P. Co.* (54 Fed., 730) where a bill was filed to enjoin the defendants and their employees from refusing to receive and transport interstate freight coming to them over the complainant's road, the complainant relying upon the right granted by section 3 of the interstate commerce act, and the jurisdiction of the court was attacked, the court said: "The jurisdiction of this court to hear and decide the case made by the bill can not be maintained on the ground of the diverse citizenship of the parties, for the complainant, and at least one of the defendants, are citizens of the same

State. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the act of the Congress passed February 4, 1887 (24 Stat. L., 379), known as the interstate commerce act, and an act amending it, passed March 2, 1889 (25 Stat. L., 855). These acts were passed by the Congress in the exercise of the power conferred on it by the Federal Constitution (art. 1, sec. 8, par. 3), 'to regulate commerce with foreign nations, and among the several states and with the Indian tribes.' Counsel for defendant Arthur contend that the interstate commerce law and its amendments are only declaratory of the common law, which gave the same rights to complainant, and that, therefore, this is not a case of Federal jurisdiction. The original jurisdiction of this court extends, by act of the Congress passed August 13, 1888 (25 Stat. L., 433), to 'all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of \$2,000 and arising under the Constitution or laws of the United States.' The bill makes the necessary averment as to the amount in dispute. It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that the Congress, in the constitutional exercise of power, has given the positive sanction of Federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.' (See also *T. A. A. & N. M. R. Co. v. P. Co.*, 54 Fed., 746; *re Lennon*, 166 U. S., 548.)

Sec. 158. Jurisdiction of courts in interstate commerce cases.—In civil cases the jurisdiction of State and Federal courts is concurrent as to subject-matter if the suit be one affecting interstate commerce and brought to enforce rights existing but not granted by the acts to regulate commerce; in order that the Federal jurisdiction shall attach in such cases the usual requirements concerning diverse citizenship and amount in controversy must be present.

In civil suits brought to enforce rights granted by the interstate commerce acts the jurisdiction of the Federal courts is exclusive of the State courts but if damages be sought under section 9 of the act, the jurisdiction is concurrent in this behalf with that of the Commission. In such suits in the Federal courts the jurisdiction is not dependent upon diverse citizenship but is a proceeding involving a Federal question.

The criminal jurisdiction under the act, and there is no criminal jurisdiction in interstate commerce cases other than that conferred by the act, is exclusive in the Federal courts.

There is no more important question to be determined, when the subject-matter of a suit is interstate commerce, than the jurisdiction thereof of the several courts; upon the determination of this question rests the selection of the forum. Should it appear that two or more courts have concurrent jurisdiction, the reasons which weigh heaviest for the selection of a particular court, such as the statute of limitations, power of the court, etc., must receive consideration.

It is not within the scope of this work to consider the jurisdiction of

courts generally but only the jurisdiction of courts when the subject-matter is interstate commerce; thus we are limited to a consideration of the parties litigant and the character of relief asked.⁴

To determine the forum having jurisdiction in a particular case, where the subject-matter of the suit is interstate commerce, it follows from a careful consideration of all the cases, that one must determine the origin of the right of the plaintiff or complainant. The rights of users of transportation and carriers engaged therein, were, prior to the passage of the interstate commerce act, such rights as each of the parties had at common law.⁵

At the time of the passage of the interstate commerce act each of the parties to an interstate shipment possessed certain rights, duties and liabilities, which were enforceable at common law. So, also, each of the parties to an intrastate shipment possessed certain rights, duties and liabilities enforceable as at common law. As to the latter, there is no doubt that the State courts have jurisdiction to hear and determine cases arising thereunder, and such jurisdiction is exclusive except when under the acts of the Congress relating to the jurisdiction of Federal courts they have jurisdiction by reason of diverse citizenship, etc. State railway commissions, however, often exercise jurisdiction respecting intrastate transportation.

What precisely were the rights of users of transportation facilities and those transporting commodities in interstate commerce at common law is a matter of some doubt, particularly respecting discrimination between persons. The act to regulate commerce, as to the rights which it conferred, was partly in affirmance of and partly in derogation of rights existing at common law; but there remain certain rights at common law, which are neither changed nor reiterated by the act.

A careful consideration of the present law and the decisions⁶ thereunder leads to the conclusion that if a plaintiff or a complainant seeks

⁴ "Jurisdiction is the power and authority of a tribunal to hear and determine the matter in dispute between parties, of the character and residence of the disputants, and to afford the relief asked. Jurisdiction has relation to (1) the subject-matter of the litigation, (2) the parties litigant, and (3) the particular process—i. e., character of relief asked." (Andrew Am. Law, p. 1167 citing Cooper v. Reynolds, 10 Wall., 308.)

⁵ In *I. C. v. B. & O. R. Co.* (145 U. S., 263) the Supreme Court said: "Prior to the enactment of the act of February 4, 1887 (24 Stat. L., 379), to regulate commerce, commonly known as the Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers." There is still in dispute whether or not there is any "common law of the United States" (see *U. S. v. Hudson*, 7 Cranch, 32); *Wheaton v. Peters*, 8 Pet., 591; *Smith v. Alabama*, 124 U. S., 465, and *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S., 92.)

⁶ In *re Lennon* (166 U. S., 548), *T. A. A. & N. M. R. Co. v. P. Co.* (54 Fed., 730), *Lowry v. C. B. & Q. R. Co.* (46 Fed., 83), *L. R. & M. R. Co. v. E. T. V. & G. R. Co.* (47 Fed., 771), *Tift v. S. R. Co.* (123 Fed., 792), *Connor v. V. S. & P. R. Co.* (36 Fed., 273). That the State courts have no jurisdiction under the act to regulate commerce see *Swift v. P. & R. R. Co.* (58 Fed., 858), *Edmunds v. I. C. R. Co.* (80 Fed., 79), *Van Patten v. C. M. & St. P. R. Co.* (74 Fed., 981).

to enforce a right, where the subject-matter is interstate commerce, and where the right is one which has not been either reiterated, modified, or denied by the act to regulate commerce, the State and Federal courts have concurrent jurisdiction of the case, subject of course to the jurisdiction of the parties. If, however, one desires to enforce a right found within the act to regulate commerce, jurisdiction to hear and determine the matter is exclusive in the Federal courts, except in a proceeding brought under sections 8 and 9 for damages, in which event the Interstate Commerce Commission has concurrent jurisdiction.

While the authority of the courts to fix rates for transportation has been questioned,⁷ yet they have considered the reasonableness of rates in order to determine whether or not the constitutional guaranties have been complied with; and such has been the practice of courts both in the matter of commission-made rates as well as where the rates have been prescribed directly by the legislature.⁸

⁷ See Judson on Interstate Commerce, sec. 124 and cases there cited; but see *Scofield v. Railway* (43 Ohio St., 571), *C. S. R. Co. v. International B. Co.* (7 Fed., 653, and 8 Fed., 190). "It is argued," said Wallace, J., in *C. S. R. Co. v. International B. Co.* (7 Fed., 653), "that the act attempts to confer upon the court the power to fix the rate of tolls which the International Bridge Company may charge, and that this is a legislative and not a judicial function. If Congress had fixed the rate of tolls as it had the right to prescribe the conditions upon which the franchise might be enjoyed, no other authority could have intervened to change these conditions. But suppose the act had, in terms, provided that the bridge company might charge reasonable tolls, would not this have been a complete exercise of the legislative power, and would it not have remained for the judicial department to decide, when controversy should arise, what were or were not reasonable tolls? And, if the act had provided for such a determination by a judicial tribunal, would this have been unconstitutional? It seems to me clearly not. It is no less the exercise of judicial functions to prescribe a rule of conduct or protect the existence of a right during a future period, than it is to determine whether the right has been invaded in the past. It is one of the common offices of a court of equity to do this."

Whatever may be the power of courts respecting the fixing of rates for the future, they have, nevertheless, through injunction, been able to prevent discriminations and grant similar relief. (*Tift v. S. R. Co.*, 123 Fed., 789, citing *Menacho v. Ward*, 27 Fed., 529; *Sou. Exp. Co. v. M. & L. R. Co.*, 8 Fed., 799, affirmed, 10 Fed., 210; *Coe v. L. & N. R. Co.*, 3 Fed., 755; 1 *High on Injunctions*, secs. 616 and 621; *Rogers Loc. Works v. E. R. Co.*, 20 N. J. Eq., 379; *Oelrichs v. Spain*, 82 U. S., 211; and *C. M. & St. P. R. Co. v. Minnesota*, 134 U. S., 418.)

The injunctive power of courts of equity has been used to compel a common carrier to make personal delivery of goods to a consignee, and restrain it from imposing upon certain warehousemen greater charges than those imposed upon others (*Vincent v. C. & A. R. Co.*, 49 Ill., 33); to compel taking of freight and restrain excessive tolls (*American Coal Co. v. G. C. Co. and C. & P. R. Co.*, 46 Md., 15); to compel one carrier to receive and transport cars from a connecting line (*C. B. & Q. R. Co. v. B. C. R. & N. R. Co.*, 34 Fed., 481); commanding a carrier to furnish another carrier the same facilities as afforded other carriers (*T. A. A. & N. M. R. Co. v. P. Co.*, 54 Fed., 746); to compel a carrier to accept freight or passengers from another company (*D. & N. O. R. Co. v. A. T. & S. F. R. Co.*, 15 Fed., 650, reversed in 110 U. S., 667, on the ground that neither the common law nor the State statutes provided rights essential to the granting of the injunction); and preventing unjust discriminations by carriers between shippers (*Scofield v. Railway*, 43 Ohio St., 571). See generally, *High on Injunctions*.

⁸ Courts generally predicate the question of reasonableness and unreasonableness of rates upon the cost of transportation; not infrequently they fall into

Federal courts have jurisdiction to entertain a bill to declare a traffic association illegal because violative of the pooling section of the interstate commerce act.⁹

Sec. 159. Essentials to confer jurisdiction on Federal courts.—Notwithstanding the jurisdiction of Federal courts under the interstate commerce act is exclusive of the State courts or concurrent with the Commission,¹⁰ and that the controversy arising under the statute is a controversy arising under the laws of the United States and diverse citizenship is not necessary¹¹ to confer jurisdiction, yet other elements necessary to give jurisdiction, such as proper service of process, must be present, and the venue¹² must be correctly laid.

The Supreme Court in *New Mexico ex rel. v. Baker* (196 U. S., 432) said that the following principle is applicable to all courts:

It is firmly established that a court of justice can not acquire jurisdiction over the person of a defendant, "except by actual service of notice within the jurisdiction upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service."

Service on the president of a railroad company temporarily within a district does not constitute proper service:

INSTANCE.—In *New Mexico ex rel. v. Baker* (196 U. S., 432), action had been brought in a territorial court against a carrier subject to the act to regulate commerce to recover damages for alleged violations of the interstate commerce act and the Sherman antitrust act; a summons was issued against one of the carriers and the return of the marshal stated that it was served on a particular day by delivering a true copy thereof with a copy of the complaint attached thereto to the president of the corporation. It appeared that the carrier was incorporated under an act of the Congress, and that it was the owner of a line of railroad within the territorial jurisdiction where suit was instituted, and was the owner of considerable quantities of land in the same district. The presiding judge quashed the return of the summons and refused to resume jurisdiction of the action so far as the defendant carrier was concerned or to require it to answer the declaration or complaint filed by the petitioner. A petition was filed for a writ of mandamus which was denied by the Supreme Court of the Territory of New Mexico, and its decision was affirmed by the United States Supreme Court. The court said:

"We are of opinion that the service of summons upon Ripley, as president, while he was passing through the territory on a railroad train was insufficient as a personal service on the company of which he was president. It is true that the company owned lands in the territory, but its office, at which the meetings of its directors was held, was in the city of New York, while the office of its

mathematical errors; were the cost accurately determined, it is doubted if it would avail much; at least, it should not be the sole criterion of the constitutionality of commission-made rates. For a criticism of the mathematics used in ascertaining the cost of transportation, see the author's article in *Green Bag* (Boston), March, 1907 (reprinted in the Appendix to this volume).

⁹ *U. S. v. Joint Traffic Association* (171 U. S., 505).

¹⁰ See section 31, *ante*.

¹¹ *In re Lennon* (166 U. S., 548).

¹² See section 167, *post*.

land commissioner was at Topeka, Kansas, and the office of its president was at Chicago, Illinois. The mere ownership of lands in New Mexico, or the bringing of suits there to protect its lands against trespasses, could not have had the effect to put the company into that territory for the purposes of a personal action against it, based on service of summons upon one of its officers while passing through the territory on a railroad train. * * *

Sec. 160. Powers given to the Federal courts by the interstate commerce acts.—The powers given to the Federal courts are both civil and criminal; the former being at law and in equity and the latter according to the customary course of criminal procedure.

The powers at law include jurisdiction to hear and determine suits brought for damages for violation of the statute, for forfeitures, and to issue extraordinary legal writs to compel obedience to the requirements of the statute, and to assist the Commission by compelling attendance of witnesses, etc.

The equitable jurisdiction is broadly divisible into two heads: (a) to enforce an order of the Commission, and (b) to set aside, annul, or suspend an order or requirement of the Commission. The former was the only remedy prior to the amendment of 1906,¹³ for the orders of the Commission were not then considered self-executing; the present statute, however, makes them such and hence the chief equitable jurisdiction under the act now is for the purpose of having orders of the Commission stayed temporarily until a decision by the courts on the matters involved, and permanently.

The specific powers given by the act to the courts are:

(A) To assist the Commission in the performance of its duties and functions:

- (1) The court may aid the Commission, after disobedience to a subpoena, by requiring attendance and testimony of witnesses and the protection of books, papers and documents (sec. 12).

(B) To consider the orders of the Commission:

- (1) At a suit of the Commission, or of any party injured, upon failure or neglect of the carrier to obey any order of the Commission, to prosecute such inquiries and make such investigations, through such means as the court shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of the petition; if after hearing the court determines that the order was regularly made and duly served to the carriers in disobedience of the same the court shall enforce obedience to the order by a writ of injunction or other proper process, mandatory or otherwise, to restrain the carrier, its officers, agents or representatives, from further disobedience of the order, or to enjoin upon the carrier or its agents obedience to it.¹⁴ Courts are given in such

¹³ Act of June 29, 1906 (34 Stat. L., 584).

¹⁴ The constitutionality of this provision must be doubted, for if invoked and enforced it would prevent the review of the decision of the Commission; the language of the provision is mandatory on the courts, if it appear that the order was regularly made and duly served—i. e., that the order was duly made at a regular session of the Commission and that service had been had in the usual and customary manner.

cases those powers ordinarily exercised by courts in compelling obedience to the writ of injunction and mandamus (sec. 16).

- (2) Where an order has been made for the payment of money and the carrier has not complied with the order within the time limit the court is authorized at the suit of the complainant or any person for whose benefit the order was made to entertain a petition setting forth the causes for which the complainant claims damages and the order of the Commission (sec. 16).

(C) Extraordinary writs:

- (1) Injunction. Under the provision of section 16 the courts are authorized to enforce obedience to an order other than an order for the payment of money by a writ of injunction or other process mandatory or otherwise.
- (2) At the suit of the Commission alleging that passengers or freight traffic is transported between given points at less than the published rates on file, or there is being committed any discrimination forbidden by law, on being satisfied of the truth of the allegations of the petition, to enforce the observance of the published tariffs or direct and require a discontinuance of the discrimination by proper orders, writs, and process; such suits may be instituted by the Attorney-General of his own motion or upon the request of the Commission (sec. 3, Elkins' law).
- (3) Mandamus. Under section 23 the circuit and district courts of the United States may upon the relation of any person alleging such violations by a common carrier as prevents the relator from having interstate traffic moved by it at the same rates as are charged, or upon terms or conditions as favorable as those given by it for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against the carrier commanding it to move and transport the traffic, or to furnish cars or facilities for transportation for the party applying for the writ; this remedy is cumulative and is not to exclude or interfere with other remedies provided for by the act (sec. 23).
- (4) The circuit and district courts may upon application of the Attorney-General, at the request of the Commission, alleging the failure to comply with the violation of any of the provisions of the act to issue a writ or writs of mandamus, commanding the carrier to comply with the provisions of the act, or any of them (sec. 20).

(D) Miscellaneous powers:

- (1) Under the provisions of section 8 the court may tax a reasonable counsel fee as costs in a suit where one seeking damages for the violation of the act prevails.
- (2) The court, or a judge thereof, may direct an examiner to divulge facts or information which may come to his knowledge during the course of his examination of the accounts of a carrier (sec. 20).

Sec. 161. Jurisdiction of circuit courts.—

UNDER REVISED STATUTES

The jurisdiction of the circuit courts of the United States is provided for by the act of March 3, 1875, as amended August 13, 1888.¹⁵ As

¹⁵ 25 Stat. L., 434.

far as may be applicable to interstate commerce matters¹⁶ their jurisdiction is:

SEC. 1. That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,¹⁷ * * * and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court;

And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district¹⁸ of the residence of either the plaintiff or the defendant;¹⁹
* * *

And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.²⁰

UNDER INTERSTATE COMMERCE ACTS

(a) Under the provisions of section 12, the circuit courts, being courts of the United States, are given jurisdiction to require the attendance and testimony of witnesses and the production of books and papers before the Commission. This jurisdiction is concurrent with the other courts of the United States.

(b) Under the provisions of section 12 circuit courts of the United States in case of contumacy or refusal to obey a subpoena issued to a carrier subject to the act, to issue an order requiring the carrier or other person to appear before the Commission and produce books and papers, if so ordered. This jurisdiction is exclusive in the circuit courts.

¹⁶ The jurisdiction of circuit courts applicable to other than interstate commerce matters is in the notes below.

¹⁷ Add "Or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

¹⁸ Compare the provisions of the interstate commerce acts relating to the venue of causes brought thereunder (sec. 167, *post*).

¹⁹ Add "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

²⁰ Appeals from district courts to circuit courts were abolished by section 4 of

(c) Under the provisions of section 16 circuit courts have jurisdiction to enforce an order of the Commission other than for the payment of money, if a carrier fails or neglects to obey the same. This jurisdiction is exclusive in the circuit courts.

(d) Under the provisions of section 16 jurisdiction is given to the circuit courts to enforce an order of the Commission for the payment of money. This jurisdiction is exclusive in the Federal courts.

(e) Under the provisions of section 23 of the act to regulate commerce circuit courts have jurisdiction upon the relation of any person alleging such violations of the acts as prevents the relator from having interstate traffic moved at the same rates, and upon as favorable terms or conditions as given to others for like traffic under similar conditions, to issue writs of mandamus. This jurisdiction is concurrent with the district courts.

(f) Under the provisions of section 20 circuit courts have jurisdiction upon the application of the Attorney-General, at the request of the Commission, to issue writs of mandamus, commanding carriers to comply with the provisions of the act. This jurisdiction is concurrent with the district courts.

(g) Under the provisions of section 9 circuit courts have jurisdiction to entertain suits for the recovery of damages from carriers for the violations of the provisions of the act. This jurisdiction is concurrent with the district courts.

(h) Under the provisions of section 3 of the Elkins' law the circuit courts are given jurisdiction to enjoin or restrain departures from published rates or discriminations prohibited by law, both as against the carriers and the parties interested in the traffic. This power is not conferred by section 12 of the act to regulate commerce:

INSTANCE.—In *U. S. v. M. P. R. Co.* (65 Fed., 903) it was held that under the present twelfth section a district attorney, under authority of the Attorney-General, may prosecute suits in the name of the United States against carriers to enjoin them from discriminating against one city in favor of another, and no preliminary investigation by the Commission is required in order to give jurisdiction. Overruled as to authority of the Commission, prior to the passage of the Elkins' law, by the Supreme Court in *M. P. R. Co. v. U. S.* (189 U. S., 274).

Sec. 162. Jurisdiction of district courts.—

UNDER REVISED STATUTES

The jurisdiction of the District Courts of the United States is provided for by section 563, Revised Statutes; as far as may be applicable to interstate commerce matters²¹ their jurisdiction is:

the act of March 3, 1891 (26 Stat. L., 826) and the same section provided for appeals from the circuit courts to the Supreme Court of the United States, or to the Circuit Courts of Appeal, as provided in sections 5 and 6 of said act.

²¹ The jurisdiction of district courts extends to many other matters than above set forth (see sec. 563, R. S.).

First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title 'CRIMES.'²²

* * * * *

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Fourth. Of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue.

* * * * *

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, Title "DEBTS DUE BY OR TO THE UNITED STATES;" and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

* * * * *

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. [And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.]

* * * * *

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty-five, Title, "CIVIL RIGHTS."

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

* * * * *

UNDER INTERSTATE COMMERCE ACTS

(a) Under the provisions of section 23 of the act to regulate commerce, district courts have jurisdiction upon the relation of any person alleging such violation of the act as prevents the relator from having interstate traffic moved at the same rates and upon as favorable terms and conditions as given to others for like traffic under similar conditions, to issue writs of mandamus. This jurisdiction is concurrent with the circuit courts.

(b) Under the provisions of section 12 a district court, being a court of the United States, may compel the attendance and testimony of witnesses and the production of books and documentary evidence before

²² Relating to the deposit of fraudulent papers in the archives of the surveyor-general's office of California.

the Commission. This jurisdiction is concurrent with other courts of the United States.

(c) Under the provisions of section 20, district courts have jurisdiction, upon the application of the Attorney-General, at the request of the Commission, to issue writs of mandamus commanding carriers to comply with the provisions of the act. This jurisdiction is concurrent with the circuit courts.

(d) Under the provisions of section 9, district courts have jurisdiction to entertain suits for the recovery of damages from carriers for violation of the provisions of the act. This jurisdiction is concurrent with the circuit courts.²³

Sec. 163. Jurisdiction of Federal courts in suits for forfeiture.—Jurisdiction of suits for forfeitures²⁴ is by statute conferred on the district courts. The third paragraph of section 563 of the Revised Statutes provides that the district courts shall have jurisdiction—

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.²⁵

The venue of suits for penalties or forfeitures is provided in section 732 of the Revised Statutes—

All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.²⁶

It is provided in section 16 of the act to regulate commerce that all the forfeitures²⁷ provided for by the act shall be payable into

²³ The statute refers to district or circuit courts "of competent jurisdiction;" as the limitation contained in the judiciary acts do not apply to suits brought under this section, suits may be brought in any district in which the defendant can be found (*Van Patten v. C. M. & St. P. R. Co.*, 74 Fed., 981).

²⁴ The term forfeiture used in this connection refers only to those instances in which the United States may sue for money damages for violations of the act.

²⁵ This provision is not repealed or modified by the judiciary act of 1875, as amended by the act of March 3, 1888 (*Helwig v. U. S.*, 188 U. S., 605).

²⁶ This provision is general and applies to any other provision concerning venue (*Pentlarge v. Kirby*, 19 Fed., 501).

²⁷ The forfeitures provided by the act to regulate commerce are:

(a) Under section 16 of the act for a carrier knowingly failing or neglecting to obey an order of the Commission, made under the provisions of section 15 of that act, forfeiture to the United States of \$5,000 for each offense; every distinct violation is a separate offense and in case of the continuing violation, each day is to be deemed a separate offense.

(b) Under section 20, the failure of a carrier to make and file the annual reports, as required by that section or a failure to make specific answer to any question authorized by the same section within thirty days from the time it is legally required to do so, a forfeiture to the United States of one hundred dollars for each and every day it shall be in default with respect thereto.

(c) Failure to file monthly reports of hearings and expenses or special reports of same, forfeiture as provided in (b) (section 20).

(d) The failure or refusal of a carrier to keep the accounts, records, and memoranda prescribed by the Commission, forfeiture for each day of \$500 (sec. 20).

(e) A failure to submit the accounts to the inspection of the Commission or its examiners, a forfeiture the same as in (d) (sec. 20).

(f) Knowingly receiving or accepting from a common carrier a rebate or offset, a forfeiture to the United States of three times the amount received or

the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It is provided in section 20 that a forfeiture for failure to file annual reports or make specific answers to questions, or filing monthly reports, or special reports, shall be recovered in the same manner as above provided under section 16.

The forfeitures provided for under section 1 of the Elkins' law (three-fold the value of the rebate or offset) are to be recovered in any court of the United States of competent jurisdiction²⁸ by a civil action.

Sec. 164. Jurisdiction in mandamus.—Jurisdiction to issue writs of mandamus generally is exercised by the Federal courts under section 716, Revised Statutes:

* * * They [Supreme Court and the circuit and district courts] shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

The jurisdiction of these courts to issue writs of mandamus is derived from necessity and from this section.²⁹ The writ can not issue in an independent suit but only as ancillary to a preacquired jurisdiction;³⁰ for this reason, the Congress having authority to do so,³¹ has conferred upon the circuit and district courts jurisdiction to entertain independent suits under the interstate commerce acts praying for writs of mandamus.

Jurisdiction is given by the act to regulate commerce to the district and circuit courts to issue writs of mandamus for the purpose of (a) commanding carrier to move like traffic under similar conditions to any other shipper (sec. 23), (b) Upon application of the Attorney-General at the request of the Commission to compel compliance with or forbid a violation of the act (sec. 20).³²

three times the value of the entire consideration; this provision to include all rebates or other considerations received for six years prior to the commencement of the action (Elkins' law, sec. 1).

²⁸ Under the provisions of section 732, Revised Statutes, this would control the venue in such suits.

²⁹ *Board of Liquidation v. U. S.* (108 Fed., 689), *U. S. v. Capdevielle* (118 Fed., 809).

³⁰ *Kendall v. U. S.* (12 Pet., 524), *The Assessors v. Osbornes* (9 Wall., 567), *Bath County v. Amy* (13 Wall., 244), *Heine v. Commissioners* (19 Wall., 655), *U. S. v. Schurz* (102 U. S., 394), *Louisiana v. Jumel* (107 U. S., 762).

³¹ *Knapp v. L. S. & M. S. R. Co.* (197 U. S., 540).

³² The former law limited the jurisdiction of the courts to issue writs of mandamus to cases of failure to publish and file schedules. Jurisdiction to issue writs of mandamus is not to be inferred from a grant of authority to the Interstate Commerce Commission to enforce the act to regulate commerce or from a provision in the act directing district attorneys or the Attorney-General to institute necessary proceedings for the enforcement of its violation (*Knapp v. L. S. & M. S. R. Co.*, 197 U. S., 540). The difference between the jurisdiction and

The writ of mandamus may issue in the first case, upon proper terms as to security although the question of fact as to proper compensation may not be determined; the writ of mandamus in such cases is cumulative.

To secure the writ of mandamus, a discrimination must be made out:

INSTANCE.—In *U. S. v. D. L. & W. R. Co.* (40 Fed., 101), held that the mandamus provision of the act does not authorize the court to grant relief where a case of unjust discrimination is not made out, although the act provides that the writ may issue notwithstanding a question of fact is undetermined.

Jurisdiction in mandamus has been exercised by the Federal courts to compel the carrier to furnish cars, but the comity between the Federal courts and the Commission is such that the court will not act in a specific case respecting the furnishing of facilities where the Commission has acted.³³

The courts may compel the furnishing of cars by mandamus:

INSTANCE.—In *W. V. N. R. Co. v. U. S. ex rel.* (134 Fed., 198) where the jurisdiction of the power of the court to fix percentage of cars was involved the court said: "The acts of the Congress forbade discrimination, and made it unlawful to give any undue or unreasonable preference or advantage to particular persons, companies, corporations, or localities, or any particular description of traffic, or to subject them to any undue or unreasonable prejudice or disadvantage in any respect whatever, and vested jurisdiction in the circuit and district courts to proceed by mandamus as a cumulative remedy for violations of the statutory provisions. * * * We are unable to accept the view that the Congress intended to confine the scope of the writ to admonition merely, or to a general command to desist from discrimination, rather than from the particular action in which the discrimination consisted. By the findings the delivery to relator of any less than 31 per cent. of the supply amounted to unlawful discrimination, and the judgment of the court did no more than to correct it."

The cases³⁴ brought to compel by mandamus the filing of reports are:

U. S. ex rel. v. N. Y. & T. S. S. Co. (Circuit Court, New York).— — — — —, 1893, petition for mandamus to compel filing of annual report; — — — — —, 1897, petition dismissed.

U. S. ex rel. v. Seaboard R. Co. (Circuit Court, Alabama).— — — — —, 1896, petition for mandamus to compel filing of annual reports; July 2, 1897, mandamus granted.

power of Federal courts to issue extraordinary legal writs and equitable writs to protect rights arising under the interstate commerce acts or under the common law is manifest. Courts of law can only issue writs in cases specifically provided for by statute; but courts of equity, beyond doubt, have inherent jurisdiction to issue writs, including injunction, to meet the exigencies of a case before them. This distinction, which has been denied, is fundamental. If true, however, it will assist in making the election whether to proceed upon the law or the equity side of the court.

³³ *B. & O. R. Co. v. Interstate Commerce Commission* decision September 23, 1908, in the district court of the United States for the district of Maryland.

³⁴ From list published by the Department of Justice. Citations were inserted by author.

U. S. ex rel. v. B., Z. & C. R. Co. (Circuit Court, Ohio).— ——— —, 1896, petition for mandamus to compel filing of annual reports; January 11, 1897, petition dismissed.

U. S. ex rel. v. C. K. & S. R. Co. (Circuit Court, Michigan).— ——— —, 1896, petition for mandamus to compel filing of annual reports; June 23, 1897, petition dismissed.

NOTE.—At the same time 61 other suits were brought in various United States courts to compel carriers to file annual reports with the Commission, but these cases were subsequently discontinued because the carriers agreed to file reports.

U. S. ex rel. v. D. & H. Co. (Circuit Court, Massachusetts).—November 17, 1903, petition to compel filing of annual reports; ———, 1905, case discontinued.

U. S. ex rel. v. L. S. & M. S. R. Co. (Circuit Court, Ohio).—November 18, 1903, petition to compel filing of annual reports; ———, 1904, petition dismissed; April 10, 1905, Supreme Court affirmed decision of circuit court. (See *Knapp v. L. S. & M. S. R. Co.*, 197 U. S., 540, holding that circuit court had no original jurisdiction under act March 3, 1887, to hear and determine a petition seeking relief by mandamus.)

U. S. ex rel. v. N. Y. C. & H. R. R. Co. (Circuit Court, New York).—November 28, 1903, petition to compel filing of annual reports; ———, 1905, case discontinued.

U. S. ex rel. v. B. & M. Co. (Circuit Court, Massachusetts).—November 29, 1903, petition to compel filing of annual reports; ———, 1905, case discontinued.

A case brought by the Commission asking the writ of mandamus against carriers subject to the act to adhere to published tariffs is:

U. S. v. M. P. R. Co. (Circuit Court, Western Missouri).—July 11, 1908, information filed under section 20 of the act of June 29, 1906, for writ of mandamus compelling the defendants to adhere to their tariffs on grain. Case pending.

Sec. 165. Jurisdiction of Federal courts to enjoin, set aside, annul, or suspend order of the Commission.—The amending act of June 29, 1906, changed the procedure in respect to the enforcement of orders of the Commission. Prior to that act it was necessary for the Commission to institute proceedings in the courts to compel obedience to its orders. By the amending act the orders and requirements are made self-executing and if in the opinion of the carrier against which an order is issued it is not warranted by the facts or the law the statute provides as a remedy for the carrier proceeding in the circuit courts for the purpose of setting aside, annulling or suspending an order or requirement.

Section 16, after providing for the venue of such suits in the several circuit courts, specifically provides that—

Jurisdiction to hear and determine such suits is hereby vested in such courts.

Suits for this purpose are brought upon the equity side of the court, the bill setting up in addition to the usual facts concerning the complainant, the filing of the petition before the Commission, the hearing and order of the Commission, etc., that the order of the Commission imposes an unjust, unreasonable and illegal restriction upon interstate commerce and upon the right to use, control and manage the

complainant's business; the prayers to such a petition are for a writ of injunction, both temporary and permanent.

The provisions of the expediting act³⁵ apply to such suits including the hearing upon application for preliminary injunction. The statute also provides that no injunction, interlocutory order, or decree suspending or restraining an order of the Commission shall be granted except on hearing after not less than five days notice to the Commission.

The suits brought against the Interstate Commerce Commission to annul, set aside, and suspend its orders, under the act of June 29, 1906, to October 1, 1908, are as follows:

D. L. & W. R. Co. v. I. C. C. and Preston & Davis (Circuit Court, Southern District of New York).—June —, 1907, involving order of the Commission respecting practice of delivering petroleum in tank cars to a certain Brooklyn (N. Y.) terminal in Preston & Davis v. D. L. & W. R. Co. (12 I. C. C., 114); motion for preliminary injunction denied (115 Fed., 512).

Alpheus B. Stickney et al. v. I. C. C. (Circuit Court, Minnesota).—May —, 1908, bill to set aside the order of the Commission respecting the terminal charge on cattle in Cattle Raisers' Assn. v. C. G. W. R. Co. (I. C. C. Docket 939); certificate under the expediting act; motion for preliminary injunction; injunction granted; 2 cases.

C. & A. R. Co. v. I. C. C. (Circuit Court, Northern Illinois), June 1, 1908, bill to set aside the order of the Commission respecting the distribution of cars to coal mines in Traer, Receiver v. C. & A. R. Co. (I. C. C. Docket 1294; 13 I. C. C., 451); certificate under expediting act; motion for preliminary injunction; opinion sustaining order in part June 29, 1908; appeal by the Commission as to that part of order set aside by the court.

I. C. R. Co. v. I. C. C. (Circuit Court, Northern Illinois), June 1, 1908; bill to set aside the order of the Commission respecting distribution of cars to coal mines in Traer, Receiver, v. C. & A. R. Co. (I. C. C. Docket 1294; 13 I. C. C., 451); certificate under expediting act; motion for preliminary injunction; opinion sustaining order in part June 29, 1908; appeal by the Commission as to part of order set aside by the court.

S. P. Co. v. I. C. C. (Circuit Court, Southern Texas), June 24, 1908, set aside order of the Commission respecting terminal charges in Eichenberg v. S. P. Co. (14 I. C. C., 250); certificate under expediting act; motion for preliminary injunction.

B. & O. R. Co. v. I. C. C. (Circuit Court, Maryland), July 20, 1908, bill to set aside the order of the Commission respecting the distribution of coal cars in Rail & R. Co. v. B. & O. R. Co. (14 I. C. C., 86); certificate under expediting act; motion for preliminary injunction.

N. Y. C. & H. R. R. Co. v. I. C. C. (Circuit Court, Southern District, New York), August 22, 1908, bill to set aside the order of the Commission respecting rates on flour in Hecker-Jones-Jewell Milling Co. v. B. & O. R. Co. (14 I. C. C., 356); certificate under expediting act; motion for preliminary injunction; injunction denied.

³⁵ Act of February 11, 1903 (32 Stat. L., 823); see section 172.

S. P. Co. v. I. C. C. (Circuit Court, Northern California), July 24, 1908, bill to set aside the order of the Commission respecting rates on lumber in Western Oregon Lumber Mfrs. Assn. v. S. P. Co. (14 I. C. C., 61); certificate under expediting act; motion for preliminary injunction.

D. L. & W. R. Co. v. I. C. C. and Rahway V. R. Co. (Circuit Court, Southern New York), August 7, 1908, bill to set aside the order of the Commission respecting switch connection in Rahway V. R. Co. v. D. L. & W. R. Co. (14 I. C. C., 191); certificate under expediting act; motion for preliminary injunction; injunction granted.

N. Y. C. & H. R. R. Co. v. I. C. C. (Circuit Court, Southern New York), August 28, 1908, bill to set aside order of Commission respecting rates on flour and grain products in Banner M. Co. v. N. Y. C. & H. R. R. Co. (14 I. C. C., 398); certificate under expediting act; motion for preliminary injunction; injunction denied.

Sec. 166. Jurisdiction to enjoin rates effective in the future.—Although some have expressed the opinion that the Federal courts have no jurisdiction to enjoin a rate effective in the future, yet the weight of authority at present (November, 1908), is in favor of the proposition. Certain it is, the Commission has no authority to prevent the taking effect of a rate or practice (if the schedule be in proper form and properly filed); so, also, the State courts have no jurisdiction in such cases. Referring to the method of initiating rates, the fact that they may be unjust and unreasonable, the necessity for a tribunal to stay their operation if clearly violative of the law and the absence of definite legislative provision for a forum, the Commission in its Twenty-First Annual Report (pp. 9-10) said:

“Under the operation of the interstate commerce act the right to initiate interstate rates rests entirely with the railway, which may, by giving thirty days’ notice, put into effect any rate or any regulation or practice affecting a rate which it sees fit. The Commission is not required to approve these rates and has no authority whatever to condemn them. It can only act upon a rate so established by the railway in case a formal complaint is filed attacking that rate and after a full hearing. This is the express provision of the statute.

“It is certainly just that carriers should not be required to reduce their transportation charges, nor to alter their rules or practices affecting such charges, without opportunity to be heard upon their part, for these charges are, in essence, the property of the railway. It seems therefore ordinarily a just provision to require that formal notice shall be given the railway, with opportunity to justify its rate, before a reduction is ordered.

“When, however, the carrier advances a rate, or so changes a regulation or practice as to impose upon the shipping public a higher charge or some more onerous condition an entirely different question is presented. Railway rates enter to a greater extent than might at first thought be supposed into the business operations of this country. The contracts, of the coal operator, for example, run for a year, frequently for two years, and the margin of profit is such that an advance in the transportation charge of no more than 5 or 10 cents per ton may convert a profitable contract into a losing one. Engagements for the sale of grain are made upon the basis of the present rate, and an advance of 1 cent per 100 pounds may entail a loss in the transaction. The lumber manu-

facturer may arrange for his season's cut upon the basis of the existing tariff, and a change may mean disaster to his business.

"The above examples are not fancied cases. They have all been brought to the attention of the Commission within the past year in such a form as to present strong grounds for relief. Assuming that the advanced rate would be perfectly just in the end, it may nevertheless be entirely unjust to suffer it to go into effect at the time named by the carriers.

"In the majority of instances, perhaps, advances may properly be made before the reasonableness of the advanced rate has been finally passed upon by this Commission; but there are also many instances where great injustice must result unless matters can be kept in statu quo while proceedings are pending to test the reasonableness of the advance. Where a rate has been maintained for a considerable time and where business interests will be seriously affected by its change it is no undue hardship to require the carrier to continue that rate in effect until the propriety of the advance can be passed upon, and to finally make the advance itself at such time as will work no unnecessary injury. Certainly there ought to be some tribunal to which shippers can appeal, with authority, if such a course seems just, to prohibit the advance or the change until the general question can be considered.

"At the present time it is not very clear whether such authority anywhere exists. Certainly the Commission does not possess it. It cannot itself by any order restrain the advance, nor can it, apparently, apply to the courts for such a restraining order unless the advance works such a discrimination as is forbidden by the so-called Elkins act, and this is not usually true of a mere increase in the rate. In several instances courts of equity have interfered to prohibit advances pending proceedings before the Commission. In these cases an injunction has been issued in favor of the complainants alone, so that at the present time the general public is paying the advanced rate, while the complainants are being charged the old rate. These injunctions were granted upon the filing of a bond—\$10,000 in one case and \$250,000 in the other. It is evident that the application of any such practice must result in discrimination and hardship to the general public.

"We therefore recommend that when an advance in rates or a change in any regulation or practice is attacked by complaint to this Commission, the Commission shall have the power, in its discretion, after notice to and hearing of the parties, to prohibit the taking effect of the advance or change until the matter has been finally heard and determined.

"At all events Congress should definitely understand that we, under the present law, are powerless to act in reference to these advances except upon the filing of a formal complaint and after a full hearing of the case."

The Federal courts have jurisdiction to restrain the taking effect of rates and practices, if unjust and unreasonable:

INSTANCE.—In *Kiser Co. v. C. of Ga. R.* (158 Fed., 193), one of the earliest cases, a preliminary injunction was granted against a proposed advance rate on boots and shoes from Eastern points to Atlanta and adjacent territory, April 25, 1905. There was reference to a master; and, after his report, the injunction was continued in force pending a determination by the Commission of the reasonableness of the proposed increase. It will be observed that this case was instituted prior to the passage of the act of June 29, 1906, and prior to the decision in *Abilene C. O. Co. v. T. & P. R. Co.* (204 U. S., 426).

In *Macon Gro. Co. v. A. C. L. R. Co.* (163 Fed., 738), it was held that the powers given the Interstate Commerce Commission by the act of June 29, 1906,

does not deprive a Federal court from enjoining the putting in effect of an interstate rate which is shown or admitted to be arbitrary, unreasonable and unjust and to have been adopted through a combination in restraint of trade, until the rate can be passed on by the Commission, in a case where irreparable injury would result to the complainants and others affected by such rates should they be put in force.

In *Jewett Bros. & Jewett v. C. M. & St. P. R. Co.* (156 Fed., 160) it was held that the circuit court of the United States has jurisdiction of a suit by a shipper to enjoin a railroad company from putting into effect a proposed rate alleged to be unlawful, in violation of the interstate commerce act, either because unreasonable and unjust in itself or unduly discriminatory, when the jurisdictional amount is involved. In this case the jurisdictional amount was alleged on the total amount of freight charges paid, no reference being made to the total value to the complainant of the advance.

In the United States circuit court for Illinois, Judge Kohlsaat granted in the spring of 1907, preliminary injunctions against an advance in rates on milk and butter at the suit of the Beatrice Creamery Co. and Blue Valley Creamery Co.; the defendants were the M. C. R. Co., the G. T. R. Co. and P. M. R. Co. Later, and while the injunction was still in force and effect, the same complainants filed a petition with the Commission that it might determine the reasonableness of the proposed advance.

But not in a case brought after the rate has gone into effect:

INSTANCE.—In *Potlach Lumber Co. v. Spokane International* and other carriers (unreported), Judge Whitson, sitting in the circuit court for the eastern district of Washington, declined to grant an injunction against advanced lumber rates, although it is said their unreasonableness was admitted. The ground of the refusal was that the rate having already become effective the court was without jurisdiction to enjoin the taking effect. The press reports (February, 1908) of the decision read:

"The application for an injunction presents a very different question from that presented to Judges Hanford and Wolverton in the western district of Washington and in the district of Oregon, where the applications were made prior to the time the rates filed by the carriers went into effect, November 1, 1907. The application here was not made until after the rate had become effective, and it is held, therefore, that the court has no power, while the matter is pending before the Commission, at least until it has acted upon it to enjoin the enforcement of the rates.

"The application not having been made before the rate become effective the injunction will be denied, but the case will be held pending the action of the Commission, and a decree will be entered enforcing the rate fixed by the Commission, unless shippers are dissatisfied with it and consider it unreasonable and unjust, when the question will be considered as to whether the same right is in the shipper to apply to set aside the rates fixed by the Commission as is in the carrier to apply when those rates are confiscatory. Hearing to be had upon the application of either of the parties dissatisfied with the action of the Commission.

"Congress has not expressly given the courts the right to grant temporary relief to shippers pending an inquiry made by the Commission, and the agitation for an amendment of present laws preventing carriers from changing rates without the consent of the Commission shows the incompleteness of the law."

The Commission held these rates unreasonable in an opinion rendered June 2, 1908 (*Potlach Lumber Co. v. N. P. R. Co.* (14 I. C. C., 41).

Such a suit must be brought in the proper district:

INSTANCE.—In *Sunderland v. C. R. I. & P. R. Co.* (158 Fed., 877) a temporary injunction against an unjust and unreasonable charge had been granted but was vacated subsequently when it appeared that the defendant was not an inhabitant of the district in which the suit was brought.

Sec. 167. Jurisdiction over crimes and offenses.—Offenses under interstate commerce acts being offenses against the United States are cognizable only by the Federal courts.

By act of August 13, 1888,³⁶ the circuit courts of the United States “shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent with the jurisdiction of the district courts” as provided in section 563, Revised Statutes³⁷ (see section 162, *ante*, for jurisdiction of district courts over crimes and offenses).

The offenses provided by the act to regulate commerce are:

(a) Under the provisions of section 1, it is a misdemeanor to violate the pass provision, either by the carrier or one using a pass; jurisdiction of such an offense is conferred upon the same court as by the Elkins’ law, namely:

In any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.³⁸

(b) Under the provisions of section 10: (1) Wilful omission or failure to observe the act, by a common carrier, is a misdemeanor punishable by a fine not to exceed \$5,000 upon the conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed; (2) but if the offense shall be unlawful discrimination of rates the additional punishment or imprisonment in the penitentiary for not exceeding two years may be imposed; (3) false billing by a common carrier is a misdemeanor and punishable by a fine not exceeding \$5,000 or imprisonment in the penitentiary for a term of not exceeding two years or both, in the discretion of the court upon conviction thereof in any court of the United States of competent jurisdiction within the district in which the offense was committed; (4) false billing by shippers or other persons is a fraud which is declared to be a misdemeanor punishable and triable by the same court; (5) inducing a common carrier to

³⁶ 25 Stat. L., 433.

³⁷ Section 587, Revised Statutes, provides for the certification of cases from the district courts to the circuit courts. As to sufficiency of indictment under the act, see *U. S. v. Tozer* (37 Fed., 635), *U. S. v. Morsman* (42 Fed., 448), *U. S. v. Hanley* (71 Fed., 672), *U. S. v. Howell* (56 Fed., 21).

³⁸ For the constitutionality of this provision see section 168.

discriminate unjustly or aiding or abetting such unjust discrimination is a misdemeanor punishable by a fine of not exceeding \$5,000 or imprisonment in the penitentiary not exceeding two years in any court of the United States of competent jurisdiction within the district in which such offense was committed, and one inducing such discrimination and the carrier are liable jointly or severally in an action on the case brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting from such discrimination.

(c) Under the provisions of section 20: (1) It is a misdemeanor for any person to wilfully make any false entry in books of account subject to a fine of not less than \$1,000 or more than \$5,000 or imprisonment for a term of not less than one year nor more than three years or both such fine and imprisonment upon conviction in any court of the United States of competent jurisdiction; and wilfully destroying, mutilating, altering, or by other means or devices falsifying records, or wilfully neglecting or failing to make full, true, and correct entries in such accounts, or keeping other accounts than those prescribed are denominated the same offense and subject to the same penalty before the same court; (2) divulging facts or information by an examiner, excepting as ordered so to do, subjects him to a fine of not more than \$5,000, or imprisonment for a term not exceeding two years upon conviction in any court of the United States of competent jurisdiction.

(d) Under section 1 of the Elkins' law: (1) It is a misdemeanor for the corporation carrier to do or omit to do any act which would be a misdemeanor if done or omitted to be done by any director or officer of the corporation and upon conviction in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be "dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein," and the corporation is subject to the same penalties as are prescribed for individuals in the act to regulate commerce; (2) the wilful failure upon the part of a carrier to file and publish tariffs or rates, or strictly to observe them is a misdemeanor and subjects the carrier upon conviction by a court as stated in (1) above to a fine of not less than \$1,000 nor more than \$20,000 for each offense; (3) carriers or shippers who shall offer, grant, or give, or solicit, accept, or receive any rebates, concessions or discriminations are guilty of a misdemeanor and subject to a fine of not less than \$1,000 nor more than \$20,000 upon conviction by a court as in (1),

provided that if the party convicted of giving or receiving rebates shall be a natural person he is in addition to the fine liable to imprisonment in the penitentiary for a term not exceeding two years; (4) and any departure or offer to depart from the filed and published rate is an offense under section 1 of the Elkins' law, and punishable by the fine (and if a natural person the imprisonment) as therein provided upon conviction in a court of the United States, as in (1).

The indictments for alleged criminal violations of the act to regulate commerce prior to the passage of the Elkins law are:³⁰

U. S. v. Tozer (District Court, Missouri).—March 8, 1888, indictment found for giving rebates; December 17, 1892, indictment nol. proessed (37 Fed., 635; 39 Fed., 369; 39 Fed., 904).

U. S. v. Morsman (District Court, Missouri).—May 9, 1890, indictment found for undue prejudice in transporting goods by express; May 21, 1890, indictment quashed (42 Fed., 448).

U. S. v. M. C. R. Co. (District Court, Illinois).—May 10, 1890, indictment found for charging less than tariff rates; June 23, 1890, Street found guilty and fined \$3,000; others acquitted or discharged (43 Fed., 26).

U. S. v. L. S. & M. S. R. Co. (District Court, Ohio).—October 15, 1890, indictment found for failure to post tariffs; November 15, 1892, indictment nol. proessed.

U. S. v. C., C. & S. R. Co. (District Court, Ohio).—October 15, 1890, indictment found for failure to post tariffs; November 15, 1892, indictment quashed.

U. S. v. N. Y., L. E. & W. R. Co. (District Court, Ohio).—October 15, 1890, indictment found for failure to post tariffs; November 15, 1892, indictment nol. proessed.

U. S. v. C., C. & St. L. R. Co. (District Court, Ohio).—October 15, 1890, indictment found for failure to post tariff; November 15, 1902, indictment nol. proessed.

U. S. v. Johnson (District Court, Illinois).—December 5, 1890, indictment found for charging less than tariff rates; November 22, 1892, indictment nol. proessed.

U. S. v. Miller (District Court, Illinois).—December 5, 1890, indictment found for charging less than tariff rates; April 5, 1893, indictment nol. proessed.

U. S. v. Miller (District Court, Illinois).—December 5, 1890, indictment found for charging less than tariff rates; November 22, 1892, verdict of acquittal.

U. S. v. Egan (District Court, Illinois).—December 5, 1890, indictment found for charging less than tariff rates; November 22, 1892, indictment nol. proessed.

U. S. v. Edmundson (District Court, Missouri).—December 17, 1890, indictment found for false report of weight; June 8, 1891, prisoner plead guilty, and fined \$100 on each count.

U. S. v. Egan (District Court, Minnesota).—January 22, 1891, indictment found for selling tickets at less than published rates; July 9, 1891, verdict of acquittal directed by the court.

U. S. v. McCormick (District Court, Maryland).—March 16, 1891, indictment for false billing; May 13, 1891, verdict of guilty; fined \$100.

U. S. v. Stimson (District Court, Indiana).—March 28, 1891, indictment found for charging less than tariff rates; December 7, 1892, indictment nol. proessed.

³⁰ The lists in this section and in section 171 are, with the exception of citations, from a pamphlet published by the Department of Justice.

U. S. v. Howell (District Court, Missouri).—April 10, 1891, indictment found for false weighing; July 21, 1892, Howell and Tibbits found guilty; each fined \$2,000 and sentenced to prison for eighteen months (56 Fed., 21).

U. S. v. Rogers (District Court, Tennessee).—June 4, 1891, indictment found for false billing; December 19, 1891, indictment nol. prossed.

U. S. v. Robertson (District Court, Tennessee).—June 4, 1891, indictment found for inducing to discriminate; December 19, 1891, indictment nol. prossed.

U. S. v. Dorr (District Court, Tennessee).—June 4, 1891, indictment found for inducing to discriminate; December 19, 1891, indictment nol. prossed.

U. S. v. Keyer (District Court, Tennessee).—June 4, 1891, indictment found for inducing to discriminate; December 19, 1891, verdict of acquittal.

U. S. v. Knight (District Court, Illinois).—July 1, 1891, indictment found for charging less than tariff rates; February 29, 1892, indictment quashed.

U. S. v. Kehlor (District Court, Illinois).—July 1, 1891, indictment found for inducing to discriminate; February 29, 1892, indictment quashed.

U. S. v. Knight (District Court, Missouri).—September 7, 1891, indictment found for charging less than tariff rates; April 23, 1894, indictment quashed.

U. S. v. Wyckoff (District Court, Missouri).—October 31, 1891, indictment found for charging less than tariff rates; February 4, 1895, indictment nol. prossed.

U. S. v. Field (District Court, Missouri).—October 31, 1891, indictment found for charging less than tariff rates; October 29, 1895, nol. prossed as to some; others found not guilty; Field plead guilty, fined \$1 and costs.

U. S. v. Fowkes (District Court, Missouri).—October 31, 1891, indictment found for giving rebates; December 14, 1893, verdict of not guilty by direction of court as to all defendants except Fowkes; January 15, 1894, indictment nol. prossed and Fowkes discharged.

U. S. v. Knight (District Court, Missouri).—October 31, 1891, indictment found for charging less than tariff rates; February 4, 1895, indictment nol. prossed.

U. S. v. Crane (District Court, Missouri).—October 31, 1891, indictment found for charging less than tariff rates; December 15, 1893, indictment nol. prossed.

U. S. v. Spriggs (District Court, Illinois).—November 18, 1891, indictment found for charging less than tariff rates; May 9, 1894, indictment dismissed.

U. S. v. Swift (District Court, Illinois).—November 18, 1891, indictment found for inducing to discriminate; November 22, 1892, indictment nol. prossed.

U. S. v. Firmenich (District Court, Illinois).—November 18, 1891, indictment found for inducing to discriminate; November 22, 1892, indictment nol. prossed.

U. S. v. Fell (District Court, Illinois).—May 13, 1892, indictment found for giving rebates; July 31, 1894, indictment nol. prossed.

U. S. v. Farrell (District Court, Nebraska).—May 25, 1892, indictment found for inducing to discriminate; June 13, 1892, nol. prossed as to Sharp and verdict of not guilty as to Farrell.

U. S. v. Sharp (District Court, Nebraska).—May 25, 1892, indictment found for inducing to discriminate; June 13, 1892, verdict of guilty; fined \$25 and costs.

U. S. v. Calder (District Court, Washington).—July 12, 1893, indictment found for discrimination in sale of tickets; June 27, 1894, indictment dismissed.

U. S. v. Fraser and Wight (District Court, Pennsylvania).—October 16, 1894, indictment found for giving rebates; May 18, 1895, indictment nol. prossed.

U. S. v. Means (District Court, Pennsylvania).—October 18, 1894, indictment

found for carrying at less than tariff rates; May 6, 1895, plead *nolo contendere* and fined costs.

U. S. v. Hanley & Reinhart (District Court, Illinois).—October 19, 1894, indictment found for giving rebates; January 6, 1897, nol. prossed as to Reinhart; January 9, 1897, verdict of not guilty as to Hanley (71 Fed., 672).

U. S. v. Jenkins (District Court, Illinois).—October 19, 1894, indictment found for inducing to discriminate; January 20, 1896, indictment quashed.

U. S. v. Thompson (District Court, Illinois).—October 19, 1894, indictment for inducing to discriminate; January 20, 1896, indictment quashed.

U. S. v. Morris (District Court, Illinois).—October 29, 1894, indictment for inducing to discriminate; January 20, 1896, indictment quashed.

U. S. v. Huntington (District Court, California).—March 22, 1895, indictment found for issuing free passes; August 14, 1895, indictment nol. prossed.

U. S. v. Huntington (District Court, California).—March 26, 1895, indictment found for issuing free passes; August 14, 1895, indictment nol. prossed.

U. S. v. Fraser and Wight (District Court, Pennsylvania).—October 16, 1894, indictment found for carrying at less than tariff rates; May 18, 1895, nol. prossed as to Fraser and verdict of guilty as to Wight, who was fined \$1,000; May 24, 1897, verdict sustained by Supreme Court (167 U. S., 512).

U. S. v. Means (District Court, Pennsylvania).—October 18, 1894, indictment found for giving rebates; May 6, 1895, plead *nolo contendere* and fined \$500.

U. S. v. Fraser and Wight (District Court, Pennsylvania).—October 18, 1894, indictment found for giving rebates; May 18, 1895, indictment nol. prossed.

U. S. v. Buerger (District Court, Wisconsin).—February 19, 1896, indictment found for false billing; February 12, 1897, indictment nol. prossed.

U. S. v. Judd and Watkins (District Court, Missouri).—May 1, 1896, indictment found for false billing; May 12, 1896, Judd plead guilty and was fined \$350; October —, 1896, verdict of not guilty as to Watkins.

U. S. v. Reid (District Court, Kansas).—September 20, 1896, indictment found for false billing; April 12-24, 1897, indictment nol. prossed.

U. S. v. De Coursey (District Court, New York).—September 23, 1896, indictment found for giving rebates; September 26, 1899, indictment nol. prossed.

U. S. v. Reid (District Court, Kansas).—September 24, 1896, indictment found for false billing; April 12-24, 1897, indictment nol. prossed.

U. S. v. Dick and Blair (District Court, Pennsylvania).—October 22, 1896, indictment found for charging less than tariff rates; May 2, 1898, defendants plead *nolo contendere* and fined \$50 each.

U. S. v. Thorne and Sargent (District Court, Louisiana).—January 21, 1897, indictment found for departure from published rates; ——— —, 1897, plead guilty and each fined \$4,000.

U. S. v. Stubbs (District Court, Louisiana).—April —, 1897, indictment found for giving rebates. Case pending.

(NOTE.—Eleven other indictments were found in the same district against the same parties in June, 1898.)

U. S. v. Papy and Menzies (District Court, Florida).—December 22, 1897, indictment found for departure from published rates; January 26, 1898, indictment quashed as to Menzies; January 26, 1898, Papy plead guilty; fined \$350.

U. S. v. Pennington and Pleasants (District Court, Florida).—December 28, 1897, indictment found for departure from published rates; January 17, 1898, indictment quashed as to Pleasants; January 19, 1898, Pennington plead guilty; fined \$350.

U. S. v. Price (District Court, Kentucky).—April 19, 1899, indictment found for obstructing administration of the act to regulate commerce; March 1, 1900, plead guilty and fined \$500.

U. S. v. Belknap (District Court, Texas).—June 5, 1899, indictment found for false billing; ———, 1900, indictment nol. proessed.

U. S. v. Ault (District Court, Texas).—June —, 1899, indictment found for false billing; ———, 1899, Circuit Court granted order of removal from Kentucky; October 2, 1900, Circuit Court reversed by Circuit Court of Appeals and defendants discharged.

U. S. v. Shotter (District Court, Georgia).—December 11, 1899, indictment found for false weighing; March 9, 1900, two other indictments consolidated with this case; March 9, 1900, Shotter plead guilty and was fined \$1,000; nol. proessed as to each of the other defendants.

U. S. v. Price (District Court, Kentucky).—March 1, 1900, indictment found for false billing; March 1, 1900, plead guilty and fined \$1,000.

U. S. v. L. & N. R. Co. (District Court, Kentucky).—March 14, 1902, indictment found for charging less than established rates; October 12, 1906, indictment nol. proessed.

U. S. v. L. & N. R. Co. (District Court, Kentucky).—March 14, 1902, indictment found for charging less than established rates; October 12, 1903, indictment nol. proessed.

U. S. v. I. C. R. Co. (District Court, Tennessee).—May 28, 1902, indictment found for pooling; August 15, 1905, suit dismissed.

U. S. v. Harrahan (District Court, Tennessee).—June 20, 1902, indictment found for pooling; August 15, 1905, indictment nol. proessed.

U. S. v. W. & A. R. Co. (District Court, Georgia).—June 20, 1902, indictment found for pooling; July 1, 1905, indictment nol. proessed.

U. S. v. Capps (District Court, Georgia).—June 20, 1902, indictment found for pooling; July 1, 1905, indictment nol. proessed.

U. S. v. Whitcomb (District Court, Minnesota).—September 4, 1902, indictment found for charging less than established rates; March —, 1903, indictment nol. proessed.

The indictments under the act to regulate commerce, as amended, are:

U. S. v. N. Y. C. & H. R. R. Co. (District Court, Western New York).—August 24, 1906, indictment returned charging failure to file schedules as required by the interstate commerce act of February 4, 1887; October 9, 1906, demurrer filed; April 4, 1907, demurrer overruled; June 10, 1907, trial commenced—verdict of guilty, and defendant sentenced to pay a fine of \$15,000; sixty days' stay of proceedings granted (146 Fed., 298).

U. S. v. U. P. Coal Co.; U. P. R. Co.; O. S. L. R. Co.; James M. Moore and Everet Buckingham (District Court, Utah).—December 7, 1906, indictment returned, charging a conspiracy to violate and for a violation of the interstate-commerce laws, involving the question of undue and unreasonable prejudice in the shipment of coal; March 4, 1907, demurrer filed; April 1, 1907, demurrer overruled as to first count and sustained as to second count; November 20, 1907, case dismissed.

U. S. v. A., T. & S. F. R. Co. (District Court, Northern Illinois).—July 10,

1907, indictment returned charging a violation of the interstate commerce laws for granting and giving rebates. Case pending.

U. S. v. A. Booth & Co. (District Court, Northern Illinois).—August 3, 1907, indictment returned charging a violation of the interstate commerce laws for accepting and receiving rebates. Case pending.

U. S. v. The N. Y., C. & St. L. R. Co., and L. V. R. Co. (District Court, Northern Illinois).—August 3, 1907, indictment returned charging a violation of the interstate commerce laws for granting and giving rebates. Case pending.

U. S. v. The N. Y., C. & St. L. R. Co. (District Court, Northern Illinois).—August 3, 1907, indictment returned under the interstate-commerce laws for granting and giving rebates. Case pending.

U. S. v. S. P. (District Court, Northern California).—September 28, 1907, indictment returned under the interstate commerce law (50 counts) charging the forwarding of 50 parcels of matting from San Francisco to final destinations at less than filed tariff; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—September 28, 1907, indictment returned under the interstate commerce law (50 counts) charging the forwarding of 50 parcels of matting from Kobe through San Francisco to points in the East at less than filed rates; November 20, 1908, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Pacific Mail S. S. Co. (District Court, Northern California).—September 28, 1907, indictment returned under the interstate commerce law (8 counts) charging the shipping of matting at less than legal tariff from Kobe through San Francisco to points in the East; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Pacific Mail S. S. Co. (District Court, Northern California).—September 28, 1907, indictment returned under the interstate commerce law (8 counts) charging the shipping of matting at less than filed tariff from Kobe through San Francisco to points in the East; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—September 28, 1907, indictment returned under the interstate commerce law (8 counts) charging the forwarding of matting from Kobe to San Francisco at less than the filed tariff; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Pacific Mail S. S. Co. (District Court, Northern California).—October 7, 1907, indictment returned under the interstate commerce law (8 counts) charging the shipping of matting from Kobe, Japan, to final destination in the United States at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—October 7, 1907, indictment returned under the interstate commerce law (8 counts) charging the shipping of matting from San Francisco to destination at less than published tariff; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Pacific Mail S. S. Co. (District Court, Northern California).—October 11, 1907, indictment returned under the interstate commerce law (4 counts) charging the shipping of matting from Kobe, Japan, to final destination in the United States at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Pacific Mail S. S. Co. (District Court, Northern California).—October 11, 1907, indictment returned under the interstate commerce law (4 counts)

charging the shipping of matting from Kobe, Japan, to final destination in the United States at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—October 11, 1907, indictment returned under the interstate commerce law (1 count) charging the shipping of one parcel of matting from Kobe, Japan, to final destination in the United States at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—October 11, 1907, indictment returned under the interstate commerce law (1 count) charging the shipping of one parcel of matting from Kobe, Japan, to final destination in the United States at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—October 11, 1907, indictment returned under the interstate commerce law (1 count) charging the shipping of one parcel of matting from San Francisco, to final destination at less than published rate; November 20, 1907, motion to quash filed; June 26, 1908, motion to quash denied. Case pending.

U. S. v. Standard Oil Co. (District Court, Western Tennessee).—October 16, 1906, indictment returned under the interstate commerce act of 1887, as amended for accepting and receiving rebates; August 7, 1907, demurrer filed; October 28, 1907, demurrer overruled; November 14, 1907, plea of not guilty. Case pending.

U. S. v. Harry Gore and Max Rabinovitz (District Court, Northern West Virginia).—January 21, 1908, indictment returned under the interstate commerce law for false billing; June 9, 1908, plea of guilty and each sentenced to pay fine of \$50; total, \$100.

U. S. v. L. M. Neiburg (District Court, Vermont).—February 29, 1908, indictment returned under the interstate commerce law (75 counts) for false billing; May 19, 1908, plea of guilty and sentenced to pay a fine of \$250.

U. S. v. Max Agel and Simon Levin (District Court, Vermont).—February 29, 1908, indictment returned under the interstate commerce law (18 counts) for false billing; May 26, 1908, plea of guilty; June 26, 1908, each defendant sentenced to pay a fine of \$25, total \$50.

U. S. v. St. L. & S. F. R. Co. (District Court, Eastern Missouri).—March 3, 1908, indictment returned (13 counts) charging a violation of the interstate commerce law as amended by the Elkins' law in offering, granting, and giving rebates; March 10, 1908, plea of guilty; sentenced to pay fine of \$13,000.

U. S. v. Chapman & Dewey Lumber Co. (District Court, Eastern Missouri).—March 3, 1908, indictment returned (13 counts) charging a violation of the interstate commerce law as amended by the Elkins' law in accepting and receiving rebates; March 30, 1908, plea of guilty and fine of \$13,000 imposed.

U. S. v. I. C. R. Co. (Circuit Court, Eastern Louisiana).—May 16, 1908, indictment returned under the interstate commerce law as amended by the act of June 29, 1906, for granting and giving rebates. Case pending.

U. S. v. Y. & M. V. R. Co. (Circuit Court, Eastern Louisiana).—May 18, 1908, indictment returned charging a violation of the interstate commerce law as amended by the act of June 29, 1906, in granting and giving rebates. Case pending.

U. S. v. S. P. Co. (District Court, Southern California).—June 1, 1908, indictment returned under the interstate commerce law for granting and giving rebates. Case pending.

U. S. v. S. P. Co. (District Court, Southern California).—June 1, 1908, in-

dictment returned under the interstate commerce law for granting and giving rebates. Case pending.

U. S. v. S. P. Co. (District Court, Southern California).—June 1, 1908, indictment returned under the interstate commerce law for granting and giving rebates. Case pending.

U. S. v. Warner Moore and Thomas L. Moore, partners trading as Warner Moore & Co. (Circuit Court, Eastern Virginia).—June 12, 1908, indictment returned (3 counts) under the interstate commerce law for false billing. Case pending.

U. S. v. I. T. R. Co. (District Court, Southern Illinois), September 12, 1908, indictment returned, charging failure to file schedules in violation of the interstate commerce act of June 29, 1906. Case pending.

The indictments alleging a violation of the interstate commerce and Elkins' laws are:

U. S. v. Zorn (District Court, Kentucky).—October 24, 1905, indictment found for receiving rebates under the act to regulate commerce and the Elkins' law; January 17, 1906, defendants plead guilty and each was fined \$1,025.

U. S. v. G. N. R. Co. (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on iron pipe from points in New Jersey and Pennsylvania to Winnipeg, Canada. Case pending.

U. S. v. Campbell (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on iron pipe from points in New Jersey and Pennsylvania to Winnipeg, Canada. Case pending.

U. S. v. Diver (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on essence for coffee from Philadelphia to Winnipeg, Canada. Case pending.

U. S. v. Mutual Transit Co. (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on essence for coffee from Philadelphia to Minneapolis. Case pending.

U. S. v. Diver (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on essence for coffee from Philadelphia to Minneapolis. Case pending.

U. S. v. Mutual Transit Co. (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on essence for coffee from Philadelphia to Winnipeg, Canada. Case pending.

U. S. v. Lake (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on iron pipe from points in New Jersey and Pennsylvania to Winnipeg, Canada. Case pending.

U. S. v. R. D. Wood & Co. (District Court, Pennsylvania).—December 11, 1905, indictment found under the interstate commerce and Elkins' laws for receiving rebates on iron pipe from points in New Jersey and Pennsylvania to Winnipeg, Canada; April 2, 1906, verdict of not guilty as to Walter Wood and Stuart Wood (145 Fed., 406).

U. S. v. Swift & Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for receiving rebates on export shipments of packing-house products; June 12, 1906, defendants found guilty; June 22, 1906, fined \$15,000; appeal to Circuit Court of Appeals for the

Eighth Circuit; April 29, 1907, Circuit Court of Appeals affirmed judgment of the lower court; October 21, 1907, writ of certiorari allowed to the Supreme Court of the United States; March 16, 1908, judgment affirmed by the Supreme Court (153 Fed., 1; 82 C. C. A., 135; 209 U. S., 56).

U. S. v. Crosby (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for conspiracy to obtain rebates on shipments of general merchandise from Kansas City to the East; May 25, 1906, court instructed jury to bring in verdict of acquittal for the defendants.

U. S. v. Armour Packing Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for receiving rebates on export shipments of packing-house products; June 12, 1906, found guilty; June 22, 1906, fined \$15,000; appeal to Circuit Court of Appeals for the Eighth Circuit; April 29, 1907, Circuit Court of Appeals affirmed judgment of the lower court; October 21, 1907, writ of certiorari allowed to the Supreme Court of the United States; March 16, 1908, judgment affirmed by the Supreme Court (153 Fed., 1; 82 C. C. A., 135; 209 U. S., 56).

U. S. v. Cudahy Packing Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for receiving rebates on export shipments of packing-house products; June 12, 1906, found guilty; June 22, 1906, fined \$15,000; appeal to Circuit Court of Appeals for the Eighth Circuit; April 29, 1907, Circuit Court of Appeals affirmed judgment of the lower court; October 21, 1907, writ of certiorari allowed to the Supreme Court of the United States; March 16, 1908, judgment affirmed by Supreme Court (153 Fed., 1; 82 C. C. A., 135; 209 U. S., 56).

U. S. v. C., M. & St. P. R. Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on export flour; June 11, 1906, indictment nol. proessed.

U. S. v. Nelson Morris & Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for receiving rebates on shipments of lard from Kansas City to New York City and Hoboken for export; June 12, 1906, found guilty; June 22, 1906, fined \$15,000; appeal to the Circuit Court of Appeals for the Eighth Circuit; April 29, 1907, Circuit Court of Appeals affirmed judgment of the lower court; October 21, 1907, writ of certiorari allowed to the Supreme Court of the United States; March 16, 1908, judgment affirmed by the Supreme Court (153 Fed., 1; 82 C. C. A., 135; 209 U. S., 56).

U. S. v. C. & A. R. Co. (District Court, Missouri).—December 15, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on export flour; June 11, 1906, indictment nol. proessed.

U. S. v. C., B. & Q. R. Co. (District Court, Illinois).—December 29, 1905, indictment found under the interstate commerce and Elkins' laws for granting rebates on shipments of tin plate from points in Pennsylvania, Ohio, and other States to Vancouver, British Columbia; April 20, 1906, jury brought in a verdict of guilty, upon an agreed statement of facts, and the judge sentenced Miller and Bernham to pay a fine of \$10,000 each, and the C., B. & Q., \$40,000.

U. S. v. S. & C. R. Co. (District Court, Virginia).—January 10, 1906, indictment found under the interstate commerce and Elkins' laws for granting rebates on shipments of logs from Center Hill, N. C., to Suffolk, Va. Case pending.

U. S. v. Gay Manufacturing Co. (District Court, Virginia).—January 10, 1906, indictment found under the interstate commerce and Elkins' laws for re-

ceiving rebates on shipments of logs from Center Hill, N. C., to Suffolk, Va. Case pending.

U. S. v. Bosley (District Court, Virginia).—January 10, 1906, indictment found under the interstate commerce and Elkins' laws for granting rebates on shipments of logs from Center Hill, N. C., to Suffolk, Va. Case pending.

U. S. v. N. Y. C. & H. R. R. Co. (District Court, New York).—January 10, 1906, indictment found under the interstate commerce and Elkins' laws for granting rebates on general electric supplies from Schenectady, N. Y., to points outside of New York; April 2, 1907, mistrial; June term, 1907, continued on account of absence of material witness for Government; December 4-19, 1907, jury trial; disagreement. Case pending.

U. S. v. D. & H. Co. (District Court, New York).—January 10, 1906, indictment found under the interstate commerce and Elkins' laws for granting rebates on general electric supplies from Schenectady, N. Y., to points outside of New York. Case pending.

U. S. v. The N. Y. C. & H. R. R. Co. (District Court, Southern New York).—March 24, 1906, indictment returned under the interstate commerce and Elkins' laws for granting rebates; May 22, 1906, demurrer filed; July 6, 1906, demurrer overruled; September 17, 1906, plea of not guilty; November 14, 1906, trial commenced; November 15, 1906, trial concluded; verdict of guilty. November 22, 1906, defendant sentenced to pay fine of \$18,000; writ of error allowed to the Supreme Court.

U. S. v. American Sugar Refining Co. (District Court, Southern New York).—March 24, 1906, indictment returned under the interstate commerce and Elkins' laws for receiving rebates on shipments of sugar over New York Central and Hudson River Railroad from New York to Cleveland; November 16, 1906, jury trial; verdict guilty; November 27, 1906, defendant sentenced to pay fine of \$18,000.

U. S. v. The N. Y. C. & H. R. R. Co. and Nathan Guilford (District Court, Southern New York).—May 4, 1906, indictment returned under the interstate commerce and Elkins' laws for offering, granting, and giving rebates; May 22, 1906, demurrer filed; July 6, 1906, demurrer overruled; September 17, 1906, plea of not guilty; April 7, 1908, nolle prosequi entered as to Nathan Guilford. Case pending.

U. S. v. American Sugar Refining Co., American Sugar Refining Co. of New York, C. G. Edgar, and E. Earle (District Court, Southern New York).—May 4, 1906, indictment returned under the interstate commerce and Elkins' laws for soliciting and receiving rebates on shipments of sugar from New York to Detroit over New York Central and Hudson River Railroad; demurrers filed and overruled; December 10, 1906, defendants Edgar and Earle plead guilty and sentenced to pay a fine of \$1,000 each; December 11, 1906, American Sugar Refining Company plead guilty and was sentenced to pay a fine of \$10,000. Nol. pros. entered as to American Sugar Refining Company of New York.

U. S. v. Colorado Fuel & Iron Co. (District Court, New Mexico).—June 1, 1906, indictment found under the interstate commerce and Elkins' laws for receiving rebates on shipments of coal from Starville, Colo., to Deming, N. Mex.; July 12, 1906, case submitted on agreed statement of facts and fine of \$15,000 imposed.

U. S. v. A., T. & S. F. R. Co. (District Court, New Mexico).—June 1, 1906, indictment found under the interstate commerce and Elkins' laws for granting rebates on shipments of coal from Starville, Col., to Deming, N. Mex.; July 12, 1906, case submitted on agreed statement of facts and a fine of \$15,000 imposed.

U. S. v. A. Patriarche and Stearns Salt & Lumber Co. (District Court, Western Michigan).—December 17, 1907, indictment returned (111 counts) charging a violation of the act of June 29, 1906; the former for offering, granting, and giving rebates, the latter for accepting and receiving rebates; March 25, 1908, indictment quashed on ground that two defendants could not be joined in one indictment for different offenses.

U. S. v. Tom Williams (District Court, Northern Alabama).—March 7, 1908, information filed charging a violation of the act of June 29, 1906, with reference to misuse of free pass; March 7, 1908, plea of guilty; fined \$100.

U. S. v. St. L., I. M. & S. R. Co., M. P. R. Co., and Wilbur C. Stith (District Court, Eastern Arkansas).—April 14, 1908, indictment returned (58 counts) charging a violation of the Elkins law and the act of June 29, 1906, in offering, granting, and giving rebates. Case pending.

U. S. v. T. H. Bunch (District Court, Eastern Arkansas).—April 14, 1908, indictment returned (58 counts) charging a violation of the Elkins law and the act of June 29, 1906, in accepting and receiving rebates. Case pending.

U. S. v. L. J. Clark (District Court, South Carolina).—April 21, 1908, information filed (2 counts) charging a violation of the act of June 29, 1906, with reference to misuse of free pass; plea of guilty and sentenced to pay fine of \$100.

U. S. v. M., K. & T. R. Co. (District Court, Western Missouri).—May 5, 1908, indictment returned (19 counts) under the act of June 29, 1906, charging departure from published tariff in shipment of grain; May 26, 1908, plea of not guilty. Case pending.

U. S. v. Nick Nistas (District Court, Western Missouri).—May 9, 1908, indictment returned charging a violation of the act of June 29, 1906, with reference to misuse of free pass; May 12, 1908, plea of not guilty. Case pending.

U. S. v. C. & O. R. Co. (Circuit Court, Eastern Virginia).—June 9, 1908, indictment returned (9 counts) charging a violation of the Elkins law and the act of June 29, 1906, in granting and giving rebates. Case pending.

U. S. v. William R. Johnston (Circuit Court, Eastern Virginia).—June 9, 1908, indictment returned (9 counts) charging a violation of the Elkins law and the act of June 29, 1906, in accepting and receiving rebates. Case pending.

U. S. v. Alexander P. Gilbert (Circuit Court, Eastern Virginia).—June 9, 1908, indictment returned (9 counts) charging a violation of the act of June 29, 1906, in granting and giving rebates. Case pending.

U. S. v. C. & O. R. Co. (Circuit Court, Eastern Virginia).—June 12, 1908, indictment returned (4 counts) charging a violation of the Elkins law and the act of June 29, 1906, in granting and giving rebates. Case pending.

U. S. v. Illinois Glass Company and I. T. R. Co. (District Court, Southern Illinois).—September 12, 1908, indictment returned charging a violation of the act of June 29, 1906, in accepting and receiving rebates. Case pending.

The indictments under the Elkins law are:

U. S. v. C. & A. R. Co., John M. Faithorn, and Fred A. Wann (Northern District Illinois).—December 13, 1905, indictment returned under the Elkins law for granting and giving rebates on freight; July 6, 1906, jury trial; verdict of guilty; July 11, 1906, defendant corporation fined \$40,000; individual defendants fined \$10,000 each; appeal to the United States Circuit Court of Appeals. April 16, 1907, judgment affirmed by Circuit Court of Appeals; writ of certiorari allowed to Supreme Court.

U. S. v. C., B. & Q. R. Co. (District Court, Missouri).—December 15, 1905, indictment found under the Elkins law for granting rebates on export traffic from

Kansas City to Liverpool via New York City and Hoboken; June 13, 1906, verdict of guilty; June 29, 1906, fined \$15,000; appeal to Circuit Court of Appeals for the Eighth Circuit; November 8, 1907, judgment affirmed by the Circuit Court of Appeals; writ of certiorari allowed to Supreme Court; March 16, 1908, judgment affirmed (157 Fed., 830; 209 U. S., 90).

U. S. v. C. & A. R. Co., John M. Faithorn, and Fred A. Wann (District Court, Western Missouri).—December 15, 1905, indictment returned charging a violation of the act of February 4, 1887, as amended by the Elkins law for offering, granting, and giving rebates to Schwartzchild & Sulsberger Company. July 3, 1908, case dismissed.

U. S. v. N. Y. C. & H. R. R., Nathan Guilford, and Fred L. Pomeroy (Circuit Court, Southern New York).—May 4, 1906, indictment returned charging a violation of Elkins law in giving and granting rebates and concessions; demurrers filed and overruled; October 15-17, trial and verdict of guilty on certain counts of indictment; October 19, Pomeroy sentenced to pay fine of \$6,000; New York Central and Hudson River Railroad Company sentenced to pay fine of \$108,000; appeal to the Supreme Court of the United States; case against Guilford pending; April 7, 1908, nolle prosequi entered as to Nathan Guilford.

U. S. v. American Sugar Refining Co. (District Court, Southern New York).—May 4, 1906, indictment returned under the interstate commerce act and Elkins law for soliciting and receiving rebates on shipments of sugar from New York to Detroit over the New York Central and Hudson River Railroad; defendants plead not guilty; case dismissed.

U. S. v. American Sugar Refining Co. and American Sugar Refining Co. of New York (Circuit Court, Southern New York).—July 27, 1906, indictment returned charging these two companies with soliciting, accepting, and receiving rebates in violation of the Elkins law; December 11, 1906, American Sugar Refining Company pleads guilty to first count in indictment; nol. pros. as to American Sugar Refining Company of New York; defendant American Sugar Refining Company sentenced to pay fine of \$10,000.

U. S. v. Western Transit Co. (Circuit Court, Southern New York).—July 27, 1906, indictment returned charging a violation of the Elkins' law in giving and granting rebates; October 12, 1906, plea of not guilty, with leave to withdraw; October 26, 1906, demurrer filed; June 6, 1906, demurrer withdrawn and indictment dismissed by consent of United States attorney.

U. S. v. American Sugar Refining Co. and American Sugar Refining Co. of New York (Circuit Court, Southern New York).—August 10, 1906, indictment returned charging a violation of the Elkins law in soliciting, accepting, and receiving rebates from the Northern Steamship Company; December 11, 1906, American Sugar Refining Company pleads guilty to first count of indictment and nol. pros. entered as to second count; nol. pros. entered as to American Sugar Refining Company of New York; December 11, 1906, defendant American Sugar Refining Company sentenced to pay a fine of \$10,000.

U. S. v. Brooklyn Cooperage Co. (Circuit Court, Southern New York).—August 10, 1906, indictment returned charging a violation of the Elkins law in soliciting, accepting, and receiving rebates; December 11, 1906, plea of guilty entered to seven counts of the indictment and defendant sentenced to pay fine aggregating \$70,000.

U. S. v. D., L. & W. R. Co. (Circuit Court, Southern New York).—August 10, 1906, indictment returned charging a violation of the Elkins law in offering, granting, and giving rebates; October 10, 1906, plea of not guilty with leave to withdraw; November 9, 1906, demurrer filed; February 15, 1907, demurrer over-

ruled; March 11, 1907, plea of not guilty; March 12, 1907, jury trial—disagreement. Case pending.

U. S. v. N. Y. C. & H. R. R. Co. (Circuit Court, Southern New York).—August 10, 1906, indictment returned charging a violation of the Elkins law in offering, granting, and giving rebates; October 26, 1906, demurrer filed; December 3, 1907, demurrer sustained; December 13, 1907, motion made for reargument on demurrer, which was granted, and demurrer reargued, but court adhered to decision filed; writ of error allowed to Supreme Court.

U. S. v. American Sugar Refining Co., and American Sugar Refining Co. of New York, C. Goodlow Edgar, and Edwin Earle (Circuit Court, Southern New York).—August 10, 1906, indictment returned charging a violation of the Elkins law in soliciting, accepting, and receiving rebates; December 10, 1906, defendants Edgar and Earle plead guilty to five counts of the indictment, and fines imposed aggregating \$10,000; December 11, 1906, defendant, American Sugar Refining Company, pleads guilty; nol. pros. as to American Sugar Refining Company of New York. American Sugar Refining Company sentenced to pay fine aggregating \$50,000.

U. S. v. Northern Steamship Co. (Circuit Court, Southern New York).—August 10, 1906, indictment returned under the Elkins law for offering, granting, and giving rebates; October 18, 1906, plea of not guilty, with leave to withdraw; April 7, 1908, indictment nol. prossed.

U. S. v. Standard Oil Co. of New York (District Court, Western New York).—August 24, 1906, indictment returned charging violations of the Elkins law in receiving rebates; October 9, 1906, demurrer filed; March 29, 1907, demurrer overruled. Case pending.

U. S. v. Vacuum Oil Co. (District Court, Western New York).—August 24, 1906, indictment returned under the Elkins law for accepting and receiving rebates; October 9, 1906, demurrer filed; March 29, 1907, demurrer overruled; June 1, 1908, indictment nol. prossed.

U. S. v. Standard Oil Co. of New York (District Court, Western New York).—August 24, 1906, indictment returned under the Elkins law for accepting and receiving rebates; October 9, 1906, demurrer filed; March 29, 1907, demurrer overruled. Case pending.

U. S. v. P. R. Co. (District Court, Western New York).—August 24, 1906, indictment returned under the Elkins law for granting and giving rebates; October 10, 1906, demurrer filed; April 4, 1907, demurrer overruled. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer sustained.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27,

1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in accepting rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in receiving rebates. November 10, 1906, demurrer filed. January 3, 1907, demurrer overruled; March 4 to April 12, 1907, trial; April 13, 1907, verdict of guilty; August 3, 1907, sentenced to pay fine of \$29,240,000; appeal to Circuit Court of Appeals for the Seventh Circuit; July 22, 1908, Circuit Court of Appeals reversed district court with directions to grant a new trial; January 4, 1909, Supreme Court denied application for writ of certiorari. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in receiving rebates; November 10, 1906, demurrer filed; January 3, 1907, demurrer sustained.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned charging a violation of the Elkins law in receiving rebates. November 10, 1906, demurrer filed. January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. Standard Oil Co. (District Court, Northern Illinois).—August 27, 1906, indictment returned under the Elkins law for accepting rebates. November 10, 1906, demurrer filed; January 3, 1907, demurrer overruled; February 15, 1907, plea of not guilty. Case pending.

U. S. v. C., St. P., M. & O. R. Co., H. M. Pearce, E. B. Ober, and F. C. Gifford (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (50 counts) for giving rebate on shipment of grain from Minneapolis to Duluth and Superior; demurrer filed and overruled; April 2-10, 1907, trial; verdict of guilty as to the railroad company and H. M. Pearce; not guilty as to Gifford and Ober; August 23, 1907, railroad company sentenced to pay fine of \$20,000, and H. M. Pearce \$2,000; total \$22,000; August 23, 1907, writ of error allowed to Circuit Court of Appeals.

U. S. v. G. N. R. Co., B. Campbell, W. W. Broughton, H. A. Kimball, and D. G. Black (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (26 counts) for giving rebate on shipment of grain from Minneapolis to Duluth and Superior; demurrers filed and overruled; February 23, 1907, plea of not guilty; April 9, 1908, indictment nol. prossed.

U. S. v. G. N. R. Co., W. W. Broughton, and G. I. Sweney (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (15 counts) for giving rebate on shipment of grain from Minneapolis to Duluth and Superior; demurrers filed and overruled; April term, 1907, jury trial—verdict of guilty; defendant corporation fined \$15,000; appeal to Circuit Court of Appeals for Eighth Circuit; judgment affirmed by Circuit Court of Appeals; November 18, 1907, writ of certiorari allowed to the Supreme Court of the United States and case advanced for hearing on January 6, 1908; February 24, 1908, Supreme Court affirmed decision of Circuit Court of Appeals; April 9, 1908, nol. pros. entered as to individual defendants (155 Fed., 945; 208 U. S., 452).

U. S. v. W. P. Devereaux Co. (a corporation) (District Court, Minnesota).—November 8, 1906, indictment returned under Elkins law (15 counts) for so-

liciting and accepting rebates from Great Northern Railway Company. Demurrer filed and overruled; May 4, 1907, plea of guilty and a fine of \$1,000 imposed.

U. S. v. McCaull-Dinsmore Co. (a corporation) (District Court, Minnesota).—November 8, 1906, indictment returned under Elkins law (13 counts) for soliciting and accepting rebates on grain shipments; demurrer filed and overruled; July 27, 1907, plea of guilty and a fine of \$1,000 imposed.

U. S. v. Duluth-Superior Milling Co. (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (5 counts) for soliciting and accepting rebate on grain shipped from Minneapolis to Duluth and Superior; demurrer filed and overruled; August 27, 1907, plea of guilty and a fine of \$1,000 imposed.

U. S. v. Ames-Brooks Co. of Duluth (a corporation) (District Court, Minnesota).—November 8, 1906, indictment returned under Elkins law (5 counts) for soliciting and accepting rebate on grain shipped from Minneapolis to Duluth and Superior; demurrer filed and overruled; July 27, 1907, plea of guilty on first count and fine of \$1,000 imposed; other counts nol. proessed.

U. S. v. M. & St. L. R. Co., and J. T. Kenny (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (5 counts) for offering rebate to Spencer Grain Company on grain shipments; demurrers filed and overruled; February 23, 1907, plea of not guilty; November 23, 1907, indictment nol. proessed.

U. S. v. W. C. R. Co., Burton Johnson, and George T. Huey (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (17 counts) for giving rebates to Spencer Grain Company on grain shipments; demurrers filed and overruled; August 10, 1907, defendant corporation sentenced to pay fine of \$17,000, Burton Johnson \$2,000, and George T. Huey \$1,000; appeal to Circuit Court of Appeals for the Eighth Circuit.

U. S. v. G. N. R. Co., B. Campbell, W. W. Broughton, H. A. Kimball, and A. G. McGuire (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (14 counts) for giving rebate on shipment of grain from Minneapolis to Duluth and Superior; demurrers filed and overruled; February 23, 1907, plea of not guilty; April 9, 1908, indictment nol. proessed.

U. S. v. G. N. R. Co., W. W. Broughton, and G. I. Sweney (District Court, Minnesota).—November 8, 1906, indictment returned under the Elkins law (13 counts) for giving rebates to the McCaull-Dinsmore Company on grain shipments; demurrers filed and overruled; February 23, 1907, plea of not guilty; April 9, 1908, indictment nol. proessed.

U. S. v. Henry S. Hartley (District Court, Western Missouri).—November 13, 1906, indictment returned under the Elkins law for procuring concessions and rebates from the St. Louis and San Francisco and the Chicago, Burlington and Quincy Railroad companies; December 1, 1906, defendant plead guilty and fined \$1,000 and costs.

U. S. v. Waters-Peirce Oil Co. (District Court, Eastern Missouri).—November 28, 1906, indictment returned under the Elkins law for accepting and receiving rebates. Case pending.

U. S. v. Waters-Peirce Oil Co. (District Court, Eastern Missouri).—November 28, 1906, indictment returned under the Elkins law for accepting and receiving rebates. Case pending.

U. S. v. Toledo Ice and Coal Co. (District Court, Northern Ohio).—December 18, 1906, indictment returned under the Elkins law for accepting and receiving rebates; demurrer filed and overruled; June 23, 1908, plea of nolo contendere to 3 counts and a fine of \$3,600 imposed.

U. S. v. A. A. R. Co. (District Court, Northern Ohio).—December 18, 1906,

indictment returned under the Elkins law for offering, granting, and giving rebates; February 1, 1907, defendant plead guilty and was fined \$15,000.

U. S. v. John S. Schirm (District Court, Southern California).—January 9, 1907, indictment returned charging a violation of the Elkins law in accepting and receiving rebates; February 4, 1907, plea of not guilty. Case pending.

U. S. v. A., T. & S. F. R. Co. (District Court, Southern California).—January 9, 1907, indictment returned charging a violation of the Elkins law in granting and giving rebates; April 17, 1907, demurrer filed; April 26, 1907, demurrer overruled. Case pending.

U. S. v. Grand Canyon Lime & Cement Co. (District Court, Southern California).—January 9, 1907, indictment returned charging a violation of the Elkins law in accepting and receiving rebates; April 17, 1907, demurrer filed. April 26, 1907, demurrer overruled. Case pending.

U. S. v. Grand Canyon Lime & Cement Co. (District Court, Southern California).—January 9, 1907, indictment returned charging a violation of the Elkins law in accepting and receiving rebates; April 17, 1907, demurrer filed; April 26, 1907, demurrer overruled. Case pending.

U. S. v. A., T. & S. F. R. Co. (District Court, Southern California).—January 9, 1907, indictment returned charging a violation of the Elkins' law in granting and giving rebates; April 17, 1907, demurrer filed; April 26, 1907, demurrer overruled; September 30, 1907, trial—verdict of guilty on all counts; November 7, 1907, sentenced to pay a fine of \$330,000; January 14, 1908, writ of error allowed to the Circuit Court of Appeals.

U. S. v. G. N. R. Co. (District Court, Southern New York).—February 19, 1907, indictment returned under the Elkins law for offering, granting, and giving rebates; May 20, 1907, demurrer filed; June 4, 1907, demurrer overruled; June 24, 1907, plea of not guilty; April 6-7, 1908, jury trial—verdict of guilty and sentenced to pay a fine of \$5,000.

U. S. v. Western Transit Co. (Southern District, New York).—May 1, 1907, indictment returned charging a violation of the Elkins law in giving and granting rebates on sugar; June 6, 1907, plea of guilty; fined \$10,000.

U. S. v. C., M. & St. P. R. Co. (Southern District, New York).—May 7, 1907, indictment returned charging a violation of the Elkins law in giving and granting rebates on coffee; May 16, 1907, plea of guilty on first and third counts of indictment; fined \$20,000.

U. S. v. C., R. I. & P. R. Co. (Southern District, New York).—May 7, 1907, indictment returned charging a violation of the Elkins law in giving and granting rebates on coffee; May 13, 1907, plea of not guilty with leave to withdraw within one week; May 20, 1907, plea of not guilty withdrawn and plea of guilty to first and second counts of indictment; fined \$20,000.

U. S. v. N. Y., O. & W. R. Co. (Southern District, New York).—May 7, 1907, indictment returned charging a violation of the Elkins law in giving and granting rebates on coffee; May 13, 1907, plea of not guilty with leave to withdraw. Case pending.

U. S. v. W. H. Bennett (District Court, Northern Ohio).—June 7, 1907, indictment returned under the Elkins law for offering, granting, and giving rebates. Case pending.

U. S. v. C. V. R. Co. (Southern District, New York).—June 18, 1907, indictment returned under the Elkins law for offering, granting, and giving rebates; June 24, 1907, plea of not guilty with leave to withdraw; demurrer filed and overruled; March 17, 1908, defendant plead guilty on first count and sentenced to pay fine of \$1,000; other counts nol. proessed.

U. S. v. Vacuum Oil Co. (District Court, Western New York).—August 9,

1907, indictment returned (114 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. Standard Oil Co. of New York (District Court, Western New York).—August 9, 1907, indictment returned (114 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. Standard Oil Co. of New York (District Court, Western New York).—August 9, 1907, indictment returned (40 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. Standard Oil Co. of New York, and Vacuum Oil Co. (District Court, Western New York).—August 9, 1907, indictment returned (57 counts) charging a violation of the Elkins law in accepting and receiving rebates. October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. Vacuum Oil Co. (District Court, Western New York).—August 9, 1907, indictment returned (188 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. Standard Oil Co. of New York (District Court, Western New York).—August 9, 1907, indictment returned (189 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. P. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (40 counts) charging a violation of the Elkins law in giving and granting rebates. Case pending.

U. S. v. N. Y. C. & H. R. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (114 counts) charging a violation of the Elkins law in giving and granting rebates. Case pending.

U. S. v. Vacuum Oil Co. (District Court, Western New York).—August 9, 1907, indictment returned (40 counts) charging a violation of the Elkins law in accepting and receiving rebates; October 10, 1907, demurrer filed; January 4, 1908, demurrer overruled. Case pending.

U. S. v. N. Y. C. & H. R. R. Co., and P. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (40 counts) charging a violation of the Elkins law in giving and granting rebates. Case pending.

U. S. v. P. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (188 counts) charging a violation of the Elkins law in giving and granting rebates. Case pending.

U. S. v. N. Y. C. & H. R. R. Co., and P. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (188 counts) charging a violation of the Elkins law in giving and granting rebates. Case pending.

U. S. v. N. Y. C. & H. R. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned (40 counts) charging a violation of the Elkins law for giving and granting rebates. Case pending.

U. S. v. N. Y. C. & H. R. R. Co. (District Court, Western New York).—August 9, 1907, indictment returned charging a violation of the Elkins law (188 counts) for giving and granting rebates. Case pending.

U. S. v. Stearns Salt & Lumber Co. (District Court, Western Michigan).—December 17, 1907, indictment returned (20 counts) charging a violation of the Elkins law in accepting and receiving rebates; March 25, 1908, plea of guilty, and defendant sentenced to pay a fine of \$20,000.

U. S. v. S. P. Co. (District Court, Northern California).—June 26, 1908, in-

dictment returned (19 counts) charging a violation of the Elkins law in granting and giving rebates. Case pending.

U. S. v. California Pine Box & Lumber Co. (District Court, Northern California).—June 26, 1908, indictment returned (1 count) charging a violation of the Elkins law in accepting and receiving rebates. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—June 30, 1908, indictment returned (1 count) charging a violation of the Elkins law in granting and giving rebates. Case pending.

U. S. v. S. P. Co. (District Court, Northern California).—June 30, 1908, indictment returned (1 count) charging a violation of the Elkins law in granting and giving rebates. Case pending.

U. S. v. Penn Fruit Co. (District Court, Southern California).—July 10, 1908, indictment returned charging a violation of the Elkins law in accepting and receiving rebates. Case pending.

The informations alleging a violation of the Elkins law are:

U. S. v. Camden Iron Works.—Information filed June 1, 1906, in the United States District Court for the Eastern District of Pennsylvania against the Camden Iron Works for accepting rebates on iron pipe in violation of the Elkins law; defendants found guilty and sentenced to pay a fine of \$3,000 and costs of prosecution; appeal to Circuit Court of Appeals; January 28, 1908, Circuit Court of Appeals reversed decision of district court. Case pending (145 Fed., 406; 150 Fed., 214).

U. S. v. B. & O. R. Co. (Northern District, West Virginia).—October 9, 1906, information filed by the district attorney charging a violation of the Elkins law for discrimination in the distribution of cars; October 23, 1906, demurrer filed; April 28, 1907, demurrer sustained.

U. S. v. Mutual Transit Co.—Information filed February 27, 1907, in the United States District Court for the Western District of New York against the Mutual Transit Company for giving rebates in violation of the Elkins law; April 1, 1907, demurrer filed; May 24, 1907, demurrer overruled. Case pending.

U. S. v. Mutual Transit Co.—Information filed February 27, 1907, in the United States District Court for the Western District of New York against the Mutual Transit Company for giving rebates in violation of the Elkins law; April 1, 1907, demurrer filed; May 24, 1907, demurrer overruled; November 18-23, 1907, jury trial—disagreement; January 20-24, 1908, jury trial—verdict of guilty; March 9, 1908, defendant sentenced to pay fine of \$5,000.

In connection with the offenses under the act to regulate commerce there have been prosecutions under section 5440, Revised Statutes.

The cases brought under section 5440, Revised Statutes, alleging conspiracy to violate the interstate commerce acts, are:

U. S. v. Mellen (District Court, Kansas).—April 27, 1892, indictment found for conspiring to discriminate; April 11, 1894, indictment quashed as to one; nol. prossed as to others.

U. S. v. Mellen (District Court, Kansas).—April 27, 1892, indictment found for conspiring to discriminate; April 11, 1894, indictment nol. prossed.

U. S. v. Price (District Court, Kentucky).—April 18, 1899, indictment found for conspiracy to violate act to regulate commerce; March 2, 1900, indictment nol. prossed.

U. S. v. Weil (District Court, Illinois).—July 1, 1905, indictment found for conspiracy to obtain rebates contrary to the interstate commerce act and the

Elkins law on shipments of cattle and packing-house products from Chicago to New York; September —, 1905, defendants severally pleaded guilty and were sentenced to pay fines aggregating \$25,000.

U. S. v. Price & Wells (District Court, Kentucky).—October 13, 1905, indictment found for conspiracy to violate the interstate commerce act and the Elkins law; March 13, 1906, plead guilty and each fined \$1,025.

U. S. v. Thomas and Taggart (District Court, Missouri).—December 15, 1905, indictment found for conspiracy to obtain rebates contrary to the interstate commerce act and the Elkins law on shipments of general merchandise from Kansas City to the East; May 25, 1906, defendants found guilty; June 22, 1906, Thomas sentenced to jail for six months and fined \$6,000; Taggart sentenced to jail for three months and fined \$4,000; appeal to Circuit Court of Appeals for the Eighth Circuit; October 21, 1907, judgment reversed by the Circuit Court of Appeals and causes remanded to the court below for a new trial; January 25, 1908, defendants plead guilty; Thomas fined \$7,000 and Taggart \$4,000; total, \$11,000.

U. S. v. Kresky (District Court, Missouri).—December 15, 1905, indictment found for conspiring to obtain rebates contrary to the interstate commerce act and the Elkins law on export flour from Kansas City to New York City; June 11, 1906, indictment nol. prossed.

U. S. v. Nathan Guilford, Fred L. Pomeroy, C. Goodlow Edgar, and Edwin Earle (District Court, Southern New York).—May 4, 1906, indictment returned charging a conspiracy to violate the interstate commerce law by offering, granting and giving rebates; May 21, 1906, demurrers filed; July 6, 1906, demurrers sustained (146 Fed., 298).

U. S. v. Davis H. Kresky and W. A. McGowan (District Court, Western Missouri).—November 13, 1906, indictment returned under section 5440, Revised Statutes, charging a conspiracy to procure rebates and concessions from the Chicago and Alton and Chicago, Milwaukee and St. Paul Railway companies; November 20, 1906, demurrer filed; December 2, 1907, demurrer overruled; December 21, 1907, defendants plead guilty; January 21, each defendant sentenced to pay fine of \$1,000; total \$2,000.

U. S. v. Nick Nistas, Samuel C. Clark, and Louis Agnes (District Court, Western Missouri).—May 9, 1908, indictment returned charging a conspiracy to procure transportation from the Missouri Pacific Railway Company in interstate commerce for sundry persons not entitled thereto. Case pending.

Sec. 168. Venue of actions in the Federal courts.—In criminal proceedings under the interstate commerce act the venue is, under paragraph 1 of section 10, "in any district court of the United States, within the jurisdiction of which such offense was committed;" under paragraphs 2, 3 and 4 of section 10, "in any court of the United States of competent jurisdiction within the district in which such offense was committed." Under the Elkins' law for violation of section 1 the venue lies, "in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if

the offense had been actually and wholly committed therein." The venue under the pass provision of section 1 is the same.

In civil cases the requirements of the acts concerning venue is not as definite as in criminal cases. The venue of suits brought by the Commission to enforce its order was not specifically provided for prior to the amendment of 1906; formerly therefore, suits brought by the Commission for such purpose were brought under the provisions of the Revised Statutes relating to venue. By the amendment of 1906, when a carrier fails or neglects to obey an order of the Commission, other than for the payment of money, the Commission institutes by petition a suit in the circuit court in the district where the defendant carrier has its principal operating office or in which the violation or disobedience of the order has happened.

If the order be for the payment of money and the carrier does not comply with it the venue is in a circuit court of the United States for the district (a) in which the plaintiff resides, or (b) in which is located the principal operating⁴⁰ office of the carrier, or (c) through which the road of the carrier runs (sec. 16).

The venue of suits brought by carriers to enjoin, set aside, annul, or suspend any order or requirement of the Commission is in the district where such carrier has its principal operating office; if the order or requirement be against two or more carriers, then where one of them has its principal operating office; but if a carrier has its principal operating office in the District of Columbia, then the venue is in the district where such carrier has its principal office (sec. 16).

If the suit be to recover the forfeiture provided for by the act the venue is in the district where the carrier has its principal operating office or in any district through which the road of the carrier runs.

If an action be brought to enforce an order of the Commission, other than for the payment of money, by the party injured thereby the venue is in the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen.

Suits instituted by the Attorney-General for the recovery of the value of a rebate under the Elkins law for three-fold the amount of money value of the rebate may be instituted in any court of the United States of competent jurisdiction (sec. 2).

The venue of a suit brought at the instance of the Commission to enjoin or restrain departure from published rates or any discrimination prohibited by law as in a circuit court of the United States, sitting in equity, having jurisdiction; and when the act is alleged to

⁴⁰ It has been said that the reason for making the venue the principal operating office was to permit suits against western carriers nearer to the residence of the original complainant and not compel him to sue in New York City, where many western roads have their principal offices.

have been committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried or determined in either such judicial district or State (Elkins law, sec. 3).

Where a single order of the Commission has been made in favor of several complainants and there are several defendants, the venue is in any district where any one of the joint complainants could maintain his suit against any one of the joint defendants (sec. 16).

Indictment and trial may be had in districts other than that in which the crime was committed:

INSTANCE.—In *Armour P. Co. v. U. S.* (209 U. S., 56; s. c. 82, C. C. A., 135; 153 Fed., 1), it was contended that there was no jurisdiction to prosecute for an offense under the Elkins law on the ground that it was not committed in the district where the indictment was found and further that the act providing for indictment and trial in districts other than the district where the crime shall have been committed is unconstitutional, the Supreme Court said: "In this case the indictment charges the actual transportation of the property from Kansas City, Kansas, to New York City, the course of transportation being through the western district of Missouri, in which the prosecution was had.

"We are not now concerned with the construction of the act in making provision for punishing the carrier or shipper for offering, granting, or giving, or soliciting, accepting, or receiving, rebates, concessions, or discriminations, irrespective of actual transportation, for it is specifically made an offense to receive any rebate or concession whereby any such property is, by any device whatever, transported at a less rate than that named, published, and filed by the carrier; and jurisdiction is given to prosecute in any criminal court of the United States in the district through which the transportation may have been conducted.

"Having in view the offense charged in this case, we think it is clearly within the terms of the act making it penal to procure the actual transportation, by any of the means denounced in the act, of goods at a less rate than that named in the tariffs. It is the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates. Wherever such transportation is received, there the offense is to be deemed to have been committed. Why may this not be so? In this feature of the statute, the transportation being of the essence of the offense, when it takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey, it is equally and at all times committed.

"Congress also embraced in section 1 of the Elkins act offenses not depending upon actual transportation through districts; and, as to the trial of such, it also made provisions in the venue section.

"For the penal section is not only aimed at offenses whereby property is transported in interstate commerce at less than published rates, but in terms covers the offering, granting, giving, soliciting, accepting, or receiving of rebates, concessions, or discriminations, 'whereby any other advantage is given or discrimination is practiced' in respect of interstate transportation.

"Congress doubtless had in mind that some of these offenses might be complete in a single district; some might be begun in one and completed in another, and those wherein transportation—actual carriage—was made an essential element might continue through several districts; and hence undertook to provide places for trial of any offense which might be committed against the provisions of the act. It is at least certain that these sections, construed together, make an offense

of obtaining transportation at a concession from the published rate, which shall be triable in any district through which it is had. That is the offense of which the accused is charged in this case, and such is the district in which it was tried.

"It is contended that the contrary was held in the case of *Davis v. United States* (43 C. C. A., 448; 104 Fed., 136), decided in the Circuit Court of Appeals for the Sixth Circuit. In that case the prosecution was for false billing by the shipper under section 2 of the act of 1889, wherein the statute provided punishment for the offense in a single district, and it was there held that the crime was complete in the district in which the false billing was made and the goods delivered to the carrier for transportation, and that its actual carriage was not an essential element of the offense; and that a prosecution in Texas for goods falsely billed and delivered to the carrier in Ohio could not be maintained.

"Under the amended act, transportation with a rebate, or at a concession from the established rates, is made an offense as to the shipper as well as the carrier, thereby differentiating the *Elkins* act from section 2 of the act of 1889 as construed in the *Davis* case. In the *Davis* case it was specifically said:

" 'Such transportation may be through a number of districts, but Congress has given jurisdiction for punishment of the crime in the district in which the offense is committed. It must have been in the contemplation of Congress that the fraudulent representations may be made in one place, and the transportation, in the sense of actual carriage, obtained as a result thereof, may be to a State or district remote from the place of delivery, and through a number of districts of the United States. If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress, in passing this act, and providing for the place of trial and punishment in a single district evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper and the delivery for transportation takes place.'

"But it is said this construction of the act is in violation of the sixth amendment of the Constitution of the United States, which requires crimes to be prosecuted and punished in the State or district where the same are committed, and that, as the transportation was had, at least in part, in Kansas, the offense was there completed and could not be prosecuted elsewhere. But the constitutional provision does not require the prosecution of the defendant in the district wherein he may reside at the time of the commission of the offense, or where he may happen to be at that time, provided he is prosecuted where the offense is committed. The constitutional requirement is as to the locality of the offense, and not the personal presence of the offender. (*Re Palliser* (*Palliser v. United States*) 136 U. S., 257, 265; *Burton v. United States*, 202 U. S., 344, 387.) This doctrine finds illustration in *Palliser's Case*, *supra*, in which a person was prosecuted in Connecticut for mailing a letter in New York, addressed to the postmaster in the former State, to induce him to violate his official duty, and it was therein argued that the offense was complete in New York, when the letter was mailed, and that only in the New York district could the prosecution be constitutionally had; but this court, speaking through Mr. Justice Gray, said:

" 'There can be no doubt at all, if any offense was committed in New York, the offense was continuing to be committed when the letter reached the postmaster in Connecticut.'

"In that case the offender had done no act out of New York and the acts performed by him were complete when the letter was delivered at the post-office in that State; but this court held the crime to be a continuing one. We think the

doctrine for stronger reason applies in the present case, for transportation is an essential element of the offense and, as we have said, transportation equally takes place over any and all of the travelled route, and during transportation the crime is being constantly committed. It does not follow, from this view of the character of the offense, that a single transportation of goods can be made the basis of repeated separate criminal charges in each of the districts through which the transportation at an illegal rate is had. Take the present case. The charge is of a single, continuous carriage from Kansas City to New York at a concession from the legal rate for the part of the carriage between the Mississippi River and New York of 12 cents for each 100 pounds so transported. This is a single continuing offense, not a series of offenses, although it is continuously committed in each district through which the transportation is received at the prohibited rate.

“To say that this construction may work serious hardship in permitting prosecutions in places distant from the home and remote from the vicinage of the accused is to state an objection to the policy of the law, not to the power of Congress to pass it. (*Hyde v. Shine*, 199 U. S., 62, 78.) But this is a large country, and the offense under consideration is one which may be constantly committed through its length and breadth. This situation arises from modern facilities for transportation and intercommunication in interstate transportation, and considerations of convenience and hardship, while they may appeal to the legislative branch of the Government, will not prevent Congress from exercising its constitutional power in the management and control of interstate commerce. We think there was jurisdiction to prosecute for the offense charged within the western district of Missouri.”

Sec. 169. Jurisdiction not conferred by consent.—The question of jurisdiction of a Federal court must be tested by an examination of the bill or declaration and the statutes conferring jurisdiction upon these tribunals. If the necessary elements requisite to give jurisdiction are not present, jurisdiction can not be conferred by consent of the parties. If the record apparently shows that the court has jurisdiction, but it develops at any stage of the proceedings that the case does not actually involve a controversy or dispute of which the court can properly take jurisdiction, it is the duty of the court to promptly place an end to the proceedings, notwithstanding the consent of the parties that the court shall proceed.⁴¹

This is true whether the action be originally begun in a Federal court or removed from a State court, as jurisdiction can never be acquired solely because of the consent of the parties, even if they might contract in respect thereto;⁴² but one may waive certain formalities.⁴³

Sec. 170. Jurisdiction on removal.—If an action be brought in a State court to enforce any of the provisions of the interstate commerce act, the suit can not be removed into a Federal court. The jurisdiction of Federal courts to enforce rights given by the act is exclusive,⁴⁴

⁴¹ *Minnesota v. Northern Securities Co.* (194 U. S., 48).

⁴² *Brown on Jurisdiction* (sec. 5).

⁴³ *Brown on Jurisdiction* (secs. 17 and 18).

⁴⁴ That the State courts have no jurisdiction to enforce rights given by the interstate commerce act, see *Swift v. P. & R. R. Co.* (58 Fed., 858), *Edmunds v. I. C. R. Co.* (80 Fed., 79), *Van Patten v. C. M. & St. P. R. Co.* (74 Fed., 981).

and as the State court can acquire no jurisdiction, a suit removed from the State court to the Federal court will not give to the latter jurisdiction.⁴⁵ But if an action is brought to enforce a right not arising under the interstate commerce act, the State court having jurisdiction, it may be removed to a Federal court if the requirements⁴⁶ relating to removal of causes are present.⁴⁷

Sec. 171. Nature of the jurisdiction of the Federal courts in civil cases brought to enforce an order of the Commission.—The jurisdiction of Federal courts in a proceeding to enforce an order of the Commission, is not such as to make them the mere executioner of the Commission's order or recommendation, to such an extent as to impose upon the courts a nonjudicial power. The courts are not limited and restricted to the mere ministerial duty of enforcing an order or requirement of the Commission. Such suits are original and independent proceedings, in which the Commission's report is made *prima facie* evidence of the matters of fact therein stated. The court is not confined to a mere review of the case below, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission but all such other further testimony as either party may introduce bearing upon the matters in controversy.⁴⁸

The courts are not the mere executioners of the orders of the Commission :

INSTANCE.—In *K. & L. Bridge Co. v. L. & N. R. Co.* (37 Fed., 567) it was held that the circuit court is not the mere executioner of the Commission's order or recommendation, and that the court is not confined to a mere reexamination of the case as heard and reported, but is to hear and determine the case *de novo*, upon proper pleadings and proofs. The report of the Commission is only *prima facie* evidence of the facts stated, and further testimony may be introduced by either party.

But such proceeding is an independent and original one :

INSTANCE.—In *I. C. C. v. C. N. O. & T. P. R. Co.* (56 Fed., 925), held that a suit brought by the Commission to enforce an order is an original and independent proceeding, and that the court may hear and determine the cause *de novo*, upon proper pleadings and proof.

But the courts have no power to change or modify the order of the Commission :

INSTANCE.—In *D. G. H. & M. R. Co. v. I. C. C.* (74 Fed., 803), held that the power given to the courts to enforce a "lawful order" is strictly limited to the

⁴⁵ *Minnesota v. Northern Securities Co.* (194 U. S., 48), *Sheldon v. Wabash R. Co.* (105 Fed., 785), *Swift v. P. R. Co.* (58 Fed., 858).

⁴⁶ *Sheldon v. Wabash R. Co.* (105 Fed., 785).

⁴⁷ *L. V. R. Co. v. Rainey* (99 Fed., 596; 112 Fed., 487).

⁴⁸ Section 16: *K. & L. Bridge Co. v. L. & N. R. Co.* (37 Fed., 567), in which Jackson, C. J., indicated that had the power conferred upon the courts been the ministerial duty of enforcing the Commission's order, and hence non-judicial, the act might for that reason have been held unconstitutional, citing *Hayburn's case* (2 Dall. (U. S.) 409) and *U. S. v. Ferreira* (13 How., 40).

power conferred, and that the court can not modify or change the order, but is limited to granting or refusing compulsory obedience to it.

Nor substitute a modified order for the original one:

INSTANCE.—In *I. C. C. v. D., L. & W. R. Co.* (64 Fed., 723) held that the circuit court can not, on a motion for rehearing, substitute an order made by the Commission for an order which the Commission certified it intended to make.

Prior to the time the orders of the Commission were self executing many cases were brought in the courts to enforce the decisions of the Commission. In some instances the judgment and views of the Commission were sustained; in others the courts refused to enforce the orders because of different interpretations of the act, because the courts did not agree with the findings of fact, because of additional evidence introduced by the carriers before the court and which had been withheld from the Commission, all on the theory that the courts could only enforce a "lawful" order of the Commission.

The cases⁴⁰ brought to enforce the orders of the Commission are:

I. C. C. v. C., B. & Q. R. Co. (Circuit Court, Illinois).—March —, 1899, petition filed to enforce order of the Commission in the Cattle Raisers' Terminal case; December —, 1899, petition dismissed; June —, 1900, Circuit Court of Appeals affirmed circuit court; June —, 1902, Supreme Court affirmed the courts below, but without prejudice as to further proceedings; case still pending before the Commission (94 Fed., 272; 98 Fed., 173; 103 Fed., 249; 186 U. S., 320).

I. C. C. v. B. & O. R. Co. (Circuit Court, Ohio).—May —, 1890, petition filed in circuit court to enforce an order of the Commission declaring certain party rates illegal; August —, 1890, circuit court dismissed the petition; May —, 1892, Supreme Court sustained the circuit court (43 Fed., 37; 145 U. S., 263).

I. C. C. v. A., T. & S. F. R. Co. (Circuit Court, California).—April —, 1891, petition filed to enforce order of the Commission in regard to the San Bernardino long-and-short haul case; April —, 1892, petition dismissed; May 1, 1893, remanded by Supreme Court to Circuit Court of Appeals, and subsequently discontinued (50 Fed., 295; 149 U. S., 264).

I. C. C. v. L. V. R. Co. (Circuit Court, Pennsylvania).—May —, 1891, petition filed to enforce order of the Commission in the Coxe Brothers coal case; May —, 1896, petition dismissed; October 1, 1897, discontinued in the Circuit Court of Appeals (49 Fed., 117; 74 Fed., 784).

I. C. C. v. C., N. O. & T. P. R. Co. (Circuit Court, Georgia).—October —, 1891, petition filed to enforce order of Commission in the Social Circle long-and-short haul case; June —, 1893, petition dismissed by circuit court; May —, 1894, Circuit Court of Appeals sustained the Commission on two questions and the circuit court on one question; March —, 1896, Supreme Court sustained Circuit Court of Appeals (62 Fed., 690; 64 Fed., 981; 76 Fed., 183; 76 Fed., 1007; 167 U. S., 479).

I. C. C. v. G. R. Co. (Circuit Court, Georgia).—November —, 1891, petition filed to enforce order of Commission in regard to unjust discrimination because of color; —, 1899, case discontinued.

I. C. C. v. D., G. H. & M. R. Co. (Circuit Court, Michigan).—November —, 1891, petition filed to enforce order of Commission in regard to unjust discrimination by granting free cartage; October —, 1893, circuit court decreed enforcement of

⁴⁰ From list published by the Department of Justice.

Commission's order; April —, 1896, Circuit Court of Appeals reversed the circuit court; May —, 1897, Supreme Court sustained Circuit Court of Appeals (57 Fed., 1005; 74 Fed., 803; 167 U. S., 663).

I. C. C. v. T. & P. R. Co. (Circuit Court, New York).—January —, 1892, petition filed to enforce order of Commission in the Import Rate case; October —, 1892, Circuit Court decreed enforcement of Commission's order; October —, 1893, Circuit Court of Appeals sustained the circuit court; March —, 1896, Supreme Court reversed courts below (52 Fed., 187; 57 Fed., 948; 162 U. S., 197).

I. C. C. v. N. Y., P. & N. R. R. Co. (Circuit Court, Virginia).—August —, 1892, petition filed to enforce order of Commission in the Delaware Grange case; —, 1893, petition dismissed.

I. C. C. v. M. P. R. Co. (Circuit Court, North Dakota).—August —, 1892, petition filed to enforce order of the Commission in the Fargo long-and-short haul sugar case; case still pending.

I. C. C. v. L. & N. R. Co. (Circuit Court, Tennessee).—March —, 1893, petition filed to enforce order of the Commission in the Nashville coal case; April —, 1896, petition dismissed; —, 1901, case discontinued in Circuit Court of Appeals (73 Fed., 409).

I. C. C. v. L. & N. R. Co. (Circuit Court, Ohio).—March —, 1893, petition filed to enforce order of the Commission in the Gerke long-and-short haul beer case; —, 1901, case discontinued.

I. C. C. v. E. T., V. & G. R. Co. (Circuit Court, Tennessee).—April —, 1893, petition filed to enforce order of the Commission in the Chattanooga long-and-short haul case; February —, 1898, circuit court decreed enforcement of Commission's order; November —, 1899, Circuit Court of Appeals sustained the circuit court; April —, 1901, Supreme Court reversed courts below (85 Fed., 107; 99 Fed., 52; 181 U. S., 1).

I. C. C. v. W. & A. R. Co. (Circuit Court, Georgia).—May —, 1893, petition filed to enforce order of the Commission in the Georgia Railway Commission case; June —, 1898, petition dismissed; March —, 1899, Circuit Court of Appeals affirmed circuit court; April —, 1901, Supreme Court affirmed courts below (88 Fed., 186; 93 Fed., 83; 181 U. S., 29).

I. C. C. v. Clyde S. S. Co. (Circuit Court, Georgia).—This case took same course as above case (see references in preceding case).

I. C. C. v. Clyde S. S. Co. (Circuit Court, Georgia).—This case took same course as above case (see references to *I. C. C. v. W. & A. R. Co.*).

I. C. C. v. Ocean S. S. Co. (Circuit Court, Georgia).—May —, 1893, petition filed to enforce order of the Commission in the Georgia Railway Commission case; —, 1901, case discontinued.

I. C. C. v. C., N. O. & T. P. R. Co. (Circuit Court, Georgia).—Same history as above case.

I. C. C. v. C., M. & St. P. R. Co. (Circuit Court, Minnesota).—July —, 1893, petition filed to enforce order of the Commission in regard to relative wheat rates from Dakotas to Minneapolis; —, 1893, modified order of Commission complied with, and case discontinued.

I. C. C. v. A. M. R. Co. (Circuit Court, Alabama).—January —, 1894, petition filed to enforce order of the Commission in regard to the Troy long-and-short haul case; July —, 1895, petition dismissed; June —, 1896, Circuit Court of Appeals affirmed Circuit Court; November —, 1897, Supreme Court affirmed courts below (69 Fed., 227; 74 Fed., 715; 168 U. S., 144).

I. C. C. v. C., N. O. & T. P. R. Co. (Circuit Court, Ohio).—September —, 1894, petition filed to enforce order of the Commission in the Chicago and Cincinnati Freight Bureaus' cases; October —, 1896, petition dismissed; October —, 1896,

case certified to Supreme Court by Circuit Court of Appeals; May —, 1897, Supreme Court affirmed the circuit court (62 Fed., 690; 64 Fed., 981; 76 Fed., 183; 76 Fed., 1007; 167 U. S., 479).

I. C. C. v. N. E. R. Co. (Circuit Court, South Carolina).—January —, 1896, petition filed to enforce order of Commission in the Truck Farmers' strawberry case; April —, 1896, petition dismissed; November —, 1897, Circuit Court of Appeals affirmed the circuit court; no appeal (74 Fed., 70; 83 Fed., 611).

I. C. C. v. S. P. Co. (Circuit Court, Colorado).—March 30, 1896, petition filed to enforce order of the Commission in regard to unjust discrimination in rates on iron from Pueblo, Colo., to Pacific coast points; May —, 1896, plea to jurisdiction overruled. Subsequently the order of the Commission was substantially complied with and the case was discontinued.

I. C. C. v. W. N. Y. & P. R. Co. (Circuit Court, Pennsylvania).—May —, 1896, petition filed to enforce order of the Commission in the Titusville oil cases; still pending.

I. C. C. v. S. R. Co. (Circuit Court, Alabama).—November 14, 1896, petition filed to enforce order of Commission in the Piedmont long-and-short haul case; November —, 1900, petition dismissed; ——— —, 1901, case discontinued in Circuit Court of Appeals (117 Fed., 741; 122 Fed., 800).

I. C. C. v. S. R. Co. (Circuit Court, Alabama).—Same history as above case.

I. C. C. v. L. & N. R. Co. (Circuit Court, Alabama).—July 23, 1897, petition filed to enforce order of the Commission in the La Grange long-and-short haul case; December —, 1899, injunction granted; May —, 1900, Circuit Court of Appeals reversed circuit court; May 18, 1903 Supreme Court affirmed decision of Circuit Court of Appeals (101 Fed., 146; 102 Fed., 709; 108 Fed., 988; 190 U. S., 273).

I. C. C. v. N. C. & St. L. R. Co. (Circuit Court, Florida).—November 2, 1900, petition filed to enforce order of Commission in the Hampton long-and-short haul case; April 16, 1902, petition dismissed; February 24, 1903, Circuit Court of Appeals sustained circuit court; November 1, 1904, discontinued in Supreme Court by stipulation (120 Fed., 934).

I. C. C. v. L. & N. R. Co. (Circuit Court, Georgia).—June 9, 1900, petition to enforce order of the Commission in the Pensacola naval stores case; July —, 1902, injunction granted; no appeal (118 Fed., 613).

I. C. C. v. S. P. Co. (Circuit Court, California).—June —, 1900, petition filed to enforce order of the Commission in the Kearney long-and-short haul case; November 26, 1904, petition dismissed; no appeal.

I. C. C. v. S. R. Co. (Circuit Court, Virginia).—April 1, 1901, petition filed to enforce order of Commission as to unreasonable rates to Danville, Va.; August —, 1902, petition dismissed; May —, 1903, Circuit Court of Appeals sustained circuit court; November 1, 1904, discontinued in Supreme Court by stipulation (117 Fed., 741; 122 Fed., 800).

I. C. C. v. L. & N. R. Co. (Circuit Court, Georgia).—August 4, 1902, petition filed to enforce order of the Commission in the Tifton long-and-short haul case; March —, 1904, defendants complied with Commission's order; petition dismissed, defendants paying costs.

I. C. C. v. C. P. & V. R. Co. (Circuit Court, North Carolina).—August 16, 1902, petition filed to enforce order of the Commission in Wilmington Tariff Association case; August —, 1903, petition dismissed; no appeal (124 Fed., 624).

I. C. C. v. S. P. Co. (Circuit Court, California).—August 21, 1902, petition filed to enforce order of the Commission in the orange routing cases; September 6, 1904, injunction granted; February 26, 1906, Supreme Court reversed circuit court (132 Fed., 829; 200 U. S., 536).

I. C. C. v. L. S. & M. S. R. Co. (Circuit Court, Ohio).—March 19, 1903, petition filed to enforce order of the Commission in the National Hay Association case; January 27, 1905, petition dismissed; May 21, 1906, Supreme Court affirmed circuit court (134 Fed., 942; 202 U. S., 613).

I. C. C. v. C. H. & D. R. Co. (Circuit Court, Ohio).—July 20, 1904, petition filed to enforce order of the Commission in the Proctor & Gamble Soap case; November 22, 1905, injunction granted. Appeal to Supreme Court; May 13, 1908, decree affirmed by Supreme Court (146 Fed., 559; 206 U. S., 142).

I. C. C. v. C. G. W. R. Co. (Circuit Court, Illinois).—April 29, 1905, petition filed to enforce order of the Commission in Chicago Live Stock Exchange case; November 20, 1905, petition dismissed (141 Fed., 209; 209 U. S., 108).

I. C. C. v. S. P. Co. (Circuit Court, California).—April —, 1905, petition filed to enforce order of Commission in the California orange rate case; still pending (132 Fed., 829; 200 U. S., 536).

I. C. C. v. I. C. R. Co. (Circuit Court, Louisiana).—June —, 1905, petition filed to enforce order of the Commission in Central Yellow Pine Lumber Association case; case still pending (206 U. S., 441).

I. C. C. v. M. & O. R. Co. (Circuit Court, Mississippi).—July —, 1905, petition filed to enforce order of the Commission in the Aberdeen Group Commercial Association case; case still pending.

I. C. C. v. C. G. W. R. Co. (Circuit Court, Illinois).—July 17, 1905, petition filed under the Elkins law to enforce order of the Commission in Chicago Live-Stock Exchange case; November 20, 1905, petition dismissed.

Sec. 172. Limitations of actions before the courts.—In suits brought for damages under the provisions of sections 8 and 9 of the interstate commerce act the several State statutes of limitation apply, as the act prescribes no limitation within which suits based thereon shall be instituted.⁵⁰

Suits brought by a carrier to enjoin, set aside, annul, or suspend any order or requirement of the Commission may be brought at any time after such order is promulgated (sec. 16) and the statute does not provide a period of limitations within which suits of this nature must be filed. It is manifest, however, that as the orders of the Commission, other than for the payment of money, are only to remain in force and effect for a period not exceeding two years, the time within which suit must be brought to set aside such orders must be within that period.

In a suit by petition for the enforcement of an order of the Commission awarding damages, the period of limitation is one year from the date of the order (sec. 16).⁵¹

Suits brought by the Attorney-General under the provisions of section 1 of the Elkins law to recover three-fold the amount of money

⁵⁰ *Ratican v. Terminal R. Assn.* (114 Fed., 668). Thus in Missouri suit must be instituted within three years, *ibid*; and in Louisiana within one year (*Copp v. L. & N. R. Co.*, 50 Fed., 164).

⁵¹ The act provides that complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues (sec. 16); the statute is silent concerning the period of limitations within which one may sue in the courts for damages; *quaere*, is the limitation of complaints before the Commission binding on the courts, or would the State statute prevail?

received as a rebate may comprehend rebates or other considerations received or accepted for a period of six years prior to the amendment of the action.

In suits brought by the Commission to enforce its order under section 16 no period of limitations is specified in the act.

Sec. 173. Expedition of suits.—The provisions of "An act to expedite the hearing and determination of suits in equity, and so forth" approved February 11, 1903,³² are made applicable to (a) suits brought by carriers in the circuit courts against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission, including the hearing on application for a preliminary injunction, and (b) to any proceedings in equity to enforce any order or requirement of the Commission, or any provisions of the act to regulate commerce (sec. 16).

The provisions of this act also apply to proceedings brought under section 3 of the Elkins' law where the Attorney-General upon his own motion or upon the request of the Interstate Commerce Commission seeking to enforce an observance of the published tariffs or to prevent discriminations forbidden by law.

The usual practice to bring into effect the provisions of the expediting act is for the Commission, when it receives notice of the filing of an appeal and the motion for the preliminary injunction, to secure from the Attorney-General a certificate that in his opinion the case is of general public importance; such certificate is usually granted as a matter of course and the act to regulate commerce (sec. 16) makes it the duty of the Attorney-General to file the certificate in suits brought against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission. The certificate is usually filed with the clerk of the court immediately prior to the time fixed for the hearing on the motion for a preliminary injunction. If there be not present the three judges required by the act a regular continuance is taken until a practicable day when three judges can be present.

The clerk must furnish to each of the judges a copy of such certificate which serves as their authority to sit.

If upon hearing there be a division among the judges, the statute provides that the case shall be certified to the Supreme Court for review in the same manner as if an appeal had been taken.

The effect of the application of the expediting act³³ to the cases above mentioned, as well as to other cases to which it is applicable, is not only that the cases are heard by three judges but the cases are to be

³² 32 Stat. L., 823.

³³ This act provides for the expedition of cases brought under the "Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (Sherman antitrust act) and "An act to regulate commerce," approved February 4, 1887, and any other acts involving like purposes, wherein

expedited in every possible manner and assigned for hearing at the earliest practicable day; a further result of the certificate of the Attorney-General is that appeals lie direct to the Supreme Court.

This act is not repugnant to the provisions of section 16 of the act to regulate commerce, as it existed prior to the amendment of June 29, 1906, providing that an appeal should not stay or supersede the operation of a final decree; nor were the provisions of the former section 16 repealed by the expediting act (*I. C. C. v. S. P. Co.*, 137 Fed., 606).

Where a circuit court had, in a proceeding brought by the Attorney-General under section 3 of the Elkins law, ordered the production of books, papers and documents to be used as evidence before the Interstate Commerce Commission, it was held that appeal from such order was direct to the Supreme Court of the United States (*I. C. C. v. Baird*, 194 U. S., 25), as the provisions of the expediting act were specifically made to apply to such cases.

Sec. 174. Contempt of order to appear before the Commission.—Where the circuit court has ordered a common carrier subject to the interstate commerce act or an individual, requiring it or him to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question, failure to obey such order may be punished as a contempt.⁶⁴

It is provided by section 12 of the interstate commerce act that "any failure to obey such order of the court [requiring a common carrier or other person to appear before the Commission and produce books and papers, if so ordered, and give evidence] may be punished by such court as a contempt thereof." As jurisdiction to issue such an order is vested in the circuit courts, these courts have power to punish as a contempt any one failing to obey its order.

The nature of proceedings in contempt was considered in *Bessette v. Conkey Co.* (194 U. S., 324):

A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

In cases brought in the Federal courts, where jurisdiction is specifically given by the interstate commerce act, they doubtless retain their inherent power to punish for contempt, although they are given

the United States is complainant. The provisions of the expediting act were made to apply to the Elkins law (Feb. 19, 1903; 32 Stat. L., 847) by section 3 thereof. By the amendment of June 29, 1906 (34 Stat. L., 584) the provisions of the expediting act were made applicable to proceedings of a specified nature brought under the interstate commerce act. For cases in which the certificate provided by this act has been filed see sec. 165, *ante*.

⁶⁴ Disobedience to a summons issued by the Commission is not a contempt as it is an administrative body; in order to constitute contempt there must be an order of the court and disobedience thereof (*I. C. C. v. Brimson*, 154 U. S., 447).

specific powers in the one class of cases above mentioned. Should its orders or decrees, made in the course of such a proceeding, be disobeyed, or should one otherwise deport himself contrary to the well-known rules of conduct, the court doubtless has the power to punish. Such power is, however, subject to the regulating statute (sec. 725, R. S.):

The said courts [of the United States] shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct administration of justice, the misbehavior of any of the officers of said court in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.”

The provisions of section 12, giving to the courts power to compel answer to a question before the Commission is not unconstitutional:

INSTANCE.—In *I. C. C. v. Brimson* (154 U. S., 447) the Supreme Court sustained the constitutionality of section 12 of the act, holding that it did not invest the circuit courts of the United States with functions which were not judicial, saying, “that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.”

The court has power to punish an employee of the carrier, although the employee was not a party to the suit and was not served with the injunction.⁵⁵

One is not entitled to a trial by jury in a contempt proceeding;⁵⁶ but an order or judgment of a circuit court finding a person not a party to the suit guilty of contempt in having violated a restraining order, is reviewable by writ of error in the appropriate Circuit Court of Appeals.⁵⁷

Sec. 175. Jurisdiction and power of Federal courts to grant injunctions.—The jurisdiction and power of the Federal courts to grant injunctions in cases brought before them, including cases involving interstate commerce, is derived from the Constitution and the acts of the Congress conferring jurisdiction. Article III, section 1, reads:

The judicial Power of the United States, shall be vested in one supreme

⁵⁵ *In re Lennon* (166 U. S., 548).

⁵⁶ *In re Debs* (158 U. S., 654).

⁵⁷ *Bessette v. Conkey Co.* (194 U. S., 324).

Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

Section 2 reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State claiming Lands under Grants of different States, and between a State, or State;—between Citizens of different States;—between Citizens of the same the Citizens thereof, and foreign States, Citizens or Subjects.

Cases where the subject-matter is interstate commerce arise either under the Constitution or the laws of the United States.⁸⁸

The general equity jurisdiction of Federal courts and their power was provided by the sixteenth section of the original judiciary act of 1789, which provided that, "Suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." This provision was a reiteration of the chancery jurisdiction of England in the administration of equitable remedies.

The chancery jurisdiction of the Federal courts is the same in all of them and the same rules of decision apply in each:

INSTANCE.—In *Boyle v. Zacharie* (6 Pet., 648), a case involving equity jurisdiction and practice, particularly with respect to injunctions in the circuit courts of the United States, the Supreme Court stated the doctrine relating to equitable jurisdiction and the authority to issue injunctions as follows: "The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction the courts of the United States are not governed by the State practice; but the act of the Congress of 1792 (ch. 36), has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the State practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of the Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe."

The courts of the United States are specifically authorized by the interstate commerce act to issue writs of injunction where a carrier has failed or neglected to obey an order of the Commission, other than for the payment of money, either at the suit of the party injured or by the Commission (sec. 16); and in the enforcement of such writ of injunction, or other process, mandatory, or otherwise, the circuit court

⁸⁸ In re Lennon (166 U. S., 548).

has those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

Hearings upon an application for preliminary injunction to enjoin, set aside, annul, or suspend an order or requirement of the Commission are to be held before three circuit judges (or two circuit and one district judge), irrespective of the certificate provided for in the act of February 11, 1903.⁹⁹

The cases brought to enjoin departures from published tariffs are: sion are to be held before three circuit judges (or two circuit and one 1903) :

(a) Before the passage of the Elkins law (act of February 19, 1903) :

U. S. ex rel. v. Mo. Pac. R. Co. (Circuit Court, Kansas).—July 26, 1896, original proceedings to restrain defendants from discriminating in rates against Wichita, Kans.; July —, 1897, injunction granted; May 23, 1900, Circuit Court of Appeals affirmed decree of Circuit Court; March 9, 1903, Supreme Court reversed Circuit Court of Appeals and remanded case to circuit court for further proceedings. This case also construed for the first time certain sections of the Elkins law, which had just been passed (65 Fed., 903; 189 U. S., 274).

U. S. v. A., T. & S. F. R. Co. (Circuit Court, Western District, Missouri).—March 18, 1902, petition filed to enjoin departure from published tariff rates on certain commodities from Missouri River points to Atlantic seaboard; March 25, 1902, temporary injunction granted; June 2, 1902, demurrer filed; May 8, 1903, demurrer overruled; May 25, 1903, answer filed; May 10, 1907, dismissed by plaintiff without prejudice.

(NOTE.—Similar proceedings at the same time, in the same court, were taken against the following railroads: *C. R. I. & P. R. Co.*, May 4, 1908, dismissed by plaintiff without prejudice; *C., B. & Q. R. Co.*, May 10, 1907, dismissed by plaintiff without prejudice; *C. M. & St. P. R. Co.*, May 10, 1907, dismissed by plaintiff without prejudice; *C. & A. R. Co.*, May 10, 1907, dismissed by plaintiff without prejudice; *C. G. W. R. Co.*, May 10, 1907, dismissed by plaintiff without prejudice; *M. P. R. Co.*, May 9, 1908, dismissed by plaintiff without prejudice; *Wabash R. Co.*, May 4, 1908, dismissed by plaintiff without prejudice.)

U. S. v. C. & N. W. R. Co. (Circuit Court, Illinois).—March 20, 1902, petition filed to enjoin departure from published tariff rates on certain commodities from Missouri River points to Atlantic seaboard; March 24, 1902, temporary injunction granted; April 24, 1903, amended temporary injunction granted so as to be issued under the Elkins law; June 2, 1903, answer filed; June 19, 1903, referred to master to take testimony.

(NOTE.—Similar proceedings at the same time, in the same court, were taken against the following railroads: *I. C. R. Co.*, *M. C. R. Co.*, *P. Co.*, *P. C. C.* and *St. L. R. Co.*, and *L. S. & M. S. R. Co.*)

(b) Since the passage of the Elkins' law (act of February 19, 1903) :

U. S. v. C. & O. R. Co. (Circuit Court, Virginia).—July 13, 1903, petition filed under the interstate commerce act and Elkins law to restrain the Chesapeake and Ohio from giving preferences and rebates in coal rates to the N. Y., N. H.

⁹⁹ An act to expedite the hearing and determination of suits in equity, etc., approved February 11, 1903.

& H. R. Co.; February 19, 1904, injunction granted; February 19, 1906, Supreme Court affirmed circuit court (128 Fed., 59; 200 U. S., 361).

U. S. v. Milwaukee Refrigerator Transit Co. (Circuit Court, Wisconsin).—
——, 1905, petition filed under the Elkins law for an injunction to prevent payment of rebates on shipments of beer; May 31, 1906, circuit court granted injunction as to all defendants except the Pabst Brewing Company. The other defendants were the Pere Marquette Railroad Company, Erie Railroad Company, Chicago, Rock Island and Pacific Railroad Company, St. Louis and San Francisco Railroad Company, Wisconsin Central Railroad Company, and Chicago and Alton Railroad Company (145 Fed., 1007).

U. S. v. C., I. & L. R. Co. (Circuit Court, Northern Illinois).—June 19, 1907, petition filed under section 3 of the Elkins law to enjoin said company from deviating from its published tariffs. Case pending.

U. S. v. U. S. Exp. Co. (Circuit Court, Northern Illinois).—July 2, 1907, petitions filed under section 2 of the Elkins law to test law with reference to the issuance of franks by said companies; July 2, 1907, stipulations and answers filed; April 22, 1908, injunction granted prohibiting the issuance of franks, except as provided for in the act; operation of injunction suspended until December, 1908, to allow Supreme Court to pass on the question; May 18, 1908, appealed to Supreme Court.

U. S. v. M. P. R. Co. (Circuit Court, Western Missouri).—July 11, 1908, petition filed under section 20 of the act of June 29, 1906, for mandatory injunction to restrain defendants from departing from their tariff on grain originating west of the Missouri River. Case pending.

CHAPTER X

PLEADING AND PRACTICE BEFORE THE FEDERAL COURTS IN INTERSTATE COMMERCE CASES

Sec. 176. Pleadings.—It is not within the scope of this work to make any extended comments upon pleading in cases where the subject-matter is interstate commerce, and the practitioner is referred to the general works upon the subject.¹ It is sufficient to refer to the statutes and rules respecting the pleadings in Federal courts.

PLEADINGS IN LAW CAUSES

It is provided by section 914, Revised Statutes, that—
the practice, pleadings, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.

PLEADINGS IN EQUITY CAUSES

The test of equitable jurisdiction having been met,² the provisions of section 913, Revised Statutes, apply:

The forms of mesne process and the forms and modes of proceeding in suits of equity * * * in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity, * * * except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, * * * and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

¹ Rose, Code of Federal Procedure; Beach, Modern Equity Practice; Daniell, Chancery Practice; Elliott, Appellate Procedure; Stephens, Pleading (Andrews); Story, Equity Pleading; Bates, Federal Equity Procedure; Foster, Federal Practice; Garland and Ralston, Federal Practice; Hughes, Federal Procedure; Loveland, Forms of Federal Practice; May, U. S. Supreme Court Practice; Taylor, Jurisdiction and Procedure of the United States Supreme Court.

² The test of equitable jurisdiction is provided by section 723, Revised Statutes: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."

Under this provision the several rules of the Federal courts apply, and in the absence of any rule covering a specific matter it is to be governed by rule 90 of the Supreme Court:³

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

Sec. 177. Parties in proceedings before the court.—In suits brought by the Commission to enforce its order, under the provisions of section 16, such of the carriers against whom the order is made who have failed or neglected to obey the order may be made parties defendant. It is not necessary that all carriers against whom an order was made be made defendants; thus, where parties were numerous and all the defenses would be raised by carriers forming a through route, they alone were made parties defendant.⁴

PARTIES IN INTERSTATE COMMERCE CASES

Cases where the subject-matter of a suit is interstate commerce are subject to the usual rules respecting parties in Federal courts, except as those rules have been changed or modified by the statute.

Section 914 of the Revised Statutes has been held to apply to parties,⁵ thus imposing upon the Federal courts in common-law cases the duty of following a State law concerning parties, plaintiffs or defendants, and misjoinder, nonjoinder, and substitution of parties.

The interstate commerce act modifies the general requirement respecting parties as follows:

(a) Under the provisions of section 16 in suits to enforce an order of the Commission awarding damages—

parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

(b) Under the provisions of section 2 of the Elkins' law—
in any proceeding for the enforcement of the provisions of the statutes relating

³ Promulgated March 2, 1842 (1 How., lxix).

⁴ *I. C. C. v. L. S. & M. S. R.* (202 U. S., 613; 143 Fed., 942); cf. *Natl. Hay Assn. v. L. S. & M. S. R.* (9 I. C. C., 264).

⁵ *Pritchard v. Norton* (106 U. S., 124), *Albany Ins. Co. v. Lumberg* (121 U. S., 451), *Hale v. Tyler* (104 Fed., 761).

to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law in respect to carriers.

(c) Under the provisions of section 3 of the Elkins' law, in proceedings brought by the Interstate Commerce Commission to prevent the carriage of passengers or freight traffic at less than the published rates, or discriminations forbidden by the law all orders, writs and process—

may be enforceable as well against the parties interested in the traffic as against the carrier.

All carriers participating in through transportation are proper parties:

INSTANCE.—In *I. C. C. v. S. P. Co.* (74 Fed., 42) it was held that where several carriers are operated under common control, management, and arrangement and establish a rate interdicted by the Commission the charging by one of the carriers of the rate in a particular district for property to be transported over the various lines is in disobedience of the order in such district under section 16 of the act, so as to give the circuit court jurisdiction to enforce the order against all companies. All such carriers are proper parties.

But not a necessary party:

INSTANCE.—In *T. & P. R. Co. v. I. C. C.* (162 U. S., 197) one of the objections urged to the decree of the circuit court was that, as the order of the Commission involves rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight is carried, that company was a necessary party. "Undoubtedly that company would have been a proper party, but we agree with the circuit court in thinking that it was not a necessary one."

Although one of the carriers be beyond the geographical jurisdiction of the court:

INSTANCE.—In *I. C. C. v. T. & P. R. Co.* (57 Fed., 948) it was held that the court can enforce an order against a carrier party to a joint rate within the geographical jurisdiction of the court, although another carrier is without its jurisdiction and service thereon can not be had.

In suits brought to enjoin, set aside, annul, or suspend an order or requirement of the Commission a carrier, against whom an order has been issued or requirement made may be a party complainant.

Should certain carriers against whom the order has been made not wish to join as parties complainant, it would doubtless be correct to make them parties defendant in accordance with the usual equity rules.

The practice concerning parties defendant in such suits is not

uniform. In two cases⁶ the original complainant before the Commission was made a party as well as the Commission; in other cases the Commission alone was made party defendant. The better practice and the one more frequently followed is to make the original complainants before the Commission and the Commission defendants in such proceedings.

Sec. 178. Requisites of a bill to enforce an order of the Commission.—In an action brought by the Commission to enforce its order,⁷ under the provisions of section 16, the bill must set out such facts as show proper procedure in the case before the Commission, and such facts, including the disobedience of the order as will entitle the Commission to equitable relief, under the well defined limits of equity jurisdiction and the statute giving authority to apply to the circuit courts and conferring jurisdiction thereon.

Such a bill sets up: (*a*) the organization of the Commission, (*b*) the filing of the original complaint, (*c*) the answers of the defendant, (*d*) the hearings, (*e*) the report of the Commission, (*f*) the order of the Commission, (*g*) the service of the order, and (*h*) the disobedience or failure to obey the order of the Commission; the prayers of such a bill in a usual case are: for a preliminary mandatory injunction commanding the carrier to comply with the order, for a permanent injunction for general relief, and for process (see Form 12, Appendix).

The exhibits usually are the report and order of the Commission; and it is proper also to attach a copy of the original petition and answer.

Appeals from a petition instituted by the Commission, or by any party injured because of the failure of a carrier to obey an order other than for the payment of money, under the provisions of section 16 lie by either party from the circuit court to the Supreme Court of the United States, and in such court the case is to have priority in hearing and determination over all other causes except criminal causes.

Sec. 179. Requisites of a bill to enjoin, set aside, or annul an order of the Commission.—Subject to special circumstances or facts which may be present in peculiar cases, in filing a bill in the circuit court when the defeated defendant before the Commission desires to

⁶ *D. L. & W. R. Co. v. I. C. C.*, and *Preston & Davis* before circuit court of the United States for southern district of New York, June 1907, and *D. L. & W. R. Co. v. I. C. C.* and *Railway Valley R. Co.*, before the same court, June, 1908. Cf. section 165.

⁷ Since the passage of the act of June 29, 1906 (34 Stat. L., 584), no proceeding has been instituted by the Commission to enforce its order, as the present statute makes the orders of the Commission self-executing unless the carrier against which the order was issued secures an injunction against its enforcement (see section 165).

attack an order or requirement of the Commission, the bill must show such facts as will give a court of equity jurisdiction. It is doubted if the statute does or could give to the circuit courts of the United States jurisdiction to hear or determine, sitting as a court of equity, a cause which would not be cognizable by such courts. The cause of action as made out by the bill must be such as to fall within the well defined rules of equity jurisdiction.⁹

A bill filed for this purpose, and in fact all pleadings, as to their contents, is governed by the general rules applicable to pleadings in equity.⁹

A bill brought under the provisions of section 16 to enjoin, set aside, annul, or suspend an order or requirement of the Commission ought to contain: (*a*) a description of parties complainant, including their occupation,¹⁰ (*b*) a description of the Interstate Commerce Commission, with reference to the statute under which it is organized, (*c*) a description of the other defendants, if any, being the original parties complainant before the Commission, (*d*) the filing of the petition by the original complainant before the Commission, (*e*) the hearing by the Commission, (*f*) the report and order of the Commission, (*g*) the denial of the application for a rehearing, if any, (*h*) the equities of the present complainants and their interest in the proceedings, (*i*) the inequities which would result by reason of the enforcement of the order or requirement to the present complainants, and in appropriate cases, to the business interests of localities, if such be the fact, (*j*) allegations to the effect that the order or requirement is unreasonable, unjust, oppressive, and unlawful, with sufficient specifications of fact to support such allegations, (*k*) that if the order or requirement be enforced it will subject the complainant to multiplicity of suits for penalties under the act to regulate commerce, (*l*) that the Commission will institute or cause to be instituted by the original parties complainant suits for penalties. The prayers of such a bill generally are: for interlocutory or temporary order suspending the Commission's order or requirement, for a perpetual injunction, for a temporary order of the court to the effect that if delay shall result in the hearing of the bill the Commission's order shall be suspended pending hearing, the usual prayer for general relief, and the prayer for process (see Forms 13, 14, 14a, and 14b, Appendix).

Upon the filing of a suit to enjoin, set aside, annul, or suspend an order or requirement of the Commission it is the usual practice of

⁹ Pomeroy, Equity Jurisprudence; Snell, Equity.

¹⁰ See Rose, Federal Procedure; Foster, Federal Practice; Daniell, Chancery Practice, and other standard works upon the general subject.

¹⁰ If parties complainant be receivers the bill must show by what court they were appointed.

the Commission to extend, if the exigencies of the case require, the date on which the order is to become effective; and, in cases of importance, to ask the Attorney-General to file a certificate of general public importance provided for by the expediting act of February 11, 1903 (see section 173).

Sec. 180. Requisites of a bill to enjoin a rate or practice effective in the future.—Bills in Federal courts to enjoin a rate or practice effective in the future may be filed by the Interstate Commerce Commission under section 3 of the Elkins law, or by the users of transportation facilities under the broad equity jurisdiction to prevent a multiplicity of suits and other well-known equitable grounds.

A bill filed to enjoin the taking effect in the future ought to be filed before the rate actually is in effect,¹¹ otherwise the laches of the complainant may prevent the court issuing a temporary injunction. If time permits a rule to show cause should be sought; otherwise, which is more often the case, an *ex parte* application for a temporary injunction may be made at the time of the filing of the bill.

The requisites of such a bill, in addition to the formal allegations, are (a) that the present rates, as per tariffs and schedules are reasonable and just, and remunerative to the carriers; (b) that there has been filed with the Interstate Commerce Commission tariffs and schedules providing for certain other rates greater than the present rates and that said new rates are to become effective on a certain named date; (c) that the complainant, or some other on his behalf, has filed with the Commission a complaint, alleging that said new rates are unreasonable and unjust; (d) that the Commission has no authority to stay the taking effect of said new rates; (e) that said new rates are unreasonably high and will afford to the carrier a greater compensation than it is permitted by law to receive; and (f) that the complainant is remediless save by the interposition of a court of equity.

If it be claimed that the rates will be unduly prejudicial to or make an unjust discrimination against persons, commodities or localities appropriate allegations to such effect ought to be added.

If the bill attack a new regulation or practice affecting rates under section 15 of the act, and no such regulation be, at the time of filing of the bill, in force and effect, it may be alleged, that the regulation or practice is unnecessary as well as unreasonable, unjust, and unduly discriminatory.

Sec. 181. Answers.—

ANSWER OF THE COMMISSION TO A BILL BROUGHT TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ITS ORDER OR REQUIREMENT

Where bill has been filed by a carrier defendant before the Com-

¹¹ See sec. 166, *ante*.

mission to enjoin, set aside, annul, or suspend an order or requirement of the Commission, the Commission in general does not deny the equities of the complaint as matters of law or question the jurisdiction of the court. The answer must necessarily set up the proceeding before the Commission and traverse the allegations of fact tending to show the rights of the complainant to have the order or requirement set aside or enjoined.

The answer usually contains (a) the organization and establishing of the Commission by the interstate commerce act, (b) the authority of the Commission to execute and enforce the provisions of the act (sec. 12), (c) authority of the Commission under section 13 of the act to receive complaints from complainants of the character specified, (d) the filing on a certain date of a complaint by a complainant such as is required under the provisions of the law, (e) the filing of answers by the defendants, (f) the holding of a hearing or hearings, (g) the making of argument, (h) such matters and things as tend to dispute the facts alleged in the bill, (i) a general denial of all matters of fact alleged in the bill not specifically answered, and (j) finally, a prayer to dismiss hence with reasonable costs.

It is customary that a copy of the petition before the Commission, of the answer of the defendant, and of the report and order of the Commission be filed as exhibits to the answer.

ANSWER OF CARRIER TO A BILL BROUGHT TO ENFORCE AN ORDER OR REQUIREMENT OF THE COMMISSION

In an answer by a carrier to a bill brought to enforce an order of the Commission the carrier generally admits the authority of the Commission to file the bill and the regularity of the proceedings below, but denies the correctness of the facts alleged in the bill, or, at least, that such facts constitute a violation of the act. In instances where the Commission, prior to the passage of the last amendment to the law, had fixed rates for the future, either by direct order or by requiring change in classification, the jurisdiction of the Commission to make such an order was attacked upon the ground that such an order was not a "lawful order."¹²

Sec. 182. Practice.—The usual rules of practice in Federal courts apply in cases involving rights under the interstate commerce acts, subject only to the exceptions provided in those laws; these exceptions are:

(a) In matters of evidence; (b) such exceptions as must prevail where one relies upon a statutory right;¹³ (c) in the expedition of

¹² The courts are only authorized to enforce "a lawful order."

¹³ See sec. 72 and note 7.

suits provided for by act approved February 11, 1903,¹⁴ incorporated into the interstate commerce act as applicable to suits to enjoin, set aside, annul, or suspend an order or requirement of the Commission (sec. 16) and in the Elkins' law to equity cases brought by the Attorney-General in the name of the Interstate Commerce Commission to prevent the carriage of traffic or passengers at less than the published rates, or to prevent discriminations (sec. 3) and, under the provisions of section 16, hearing on preliminary injunction, and to proceedings in equity to enforce the order or requirement of the Commission as specified in the provisions of the act to regulate commerce; (d) in appeals, to be taken from an entry of order or decree (either interlocutory or final) within thirty days; appeals from an order of the circuit court to enforce an order of the Commission other than for the payment of money, to be by either party direct to the Supreme Court, where such cases have priority in hearing and determination over all causes except criminal causes, but such appeals not to affect or suspend the order appealed from; in appeals from orders of the circuit courts granting or continuing injunctions against the order of the Commission, where the appeal is direct to the Supreme Court, and where the case takes precedence over all other causes except causes of a like character and criminal causes; and in equity cases, by the act of February 11, 1903, when appeals lie direct to the Supreme Court and must be taken within sixty days from the entry of the order; and in appeals in suits brought under section 3 of the Elkins' law, to prevent the transportation of passengers or freight at less than the published rates, and to prevent discriminations as provided by law.

Sec. 183. Certificate of general public importance.—The provisions of the act of February 11, 1903,¹⁵ where there is a suit in equity pending before a circuit court under the act to regulate commerce, make it a condition precedent to the expediting of cases that the Attorney-General shall file with the clerk of the court a certificate that, in his opinion, the case is of general public importance.¹⁶ The At-

¹⁴ An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted (see sec. 173).

¹⁵ An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted (see sec. 173).

¹⁶ It will be observed that the statute specifically provides for equity suits wherein the United States is complainant; nevertheless, the certificate has been filed where common carriers subject to the act have been parties complainant (see *Stickney v. Interstate Commerce Commission*, United States circuit court for the northern district of Illinois, May, 1908; cf. sec. 165).

torney-General may file such a certificate in proceedings brought under section 3 of the Elkins law, as well as in proceedings brought by the carrier under the provisions of section 16. At the request of the Interstate Commerce Commission the certificate is usually issued as a matter of course. The practice is to file the certificate with the clerk, who is required by the act to immediately furnish to each of the circuit judges of the circuit a copy thereof. The case is thereafter to be given precedence over other cases and in every way to be expedited and assigned for hearing at the earliest practical date; but not less than three of the circuit judges of the circuit are necessary, if there be three or more; and if there be not more than two circuit judges, then it is provided that one district judge, who with the two circuit judges selected, shall act.

If upon hearing the case the three judges are divided in opinion the case is certified to the Supreme Court for review in like manner as if same had been taken there by an appeal. Such appeal (or certificate) must be made within sixty days from the entry thereof.¹⁷

The provisions of the expediting act are specifically made to apply to proceedings brought by the Commission in the courts to enforce its order or requirement, or any of the provisions of the act to regulate commerce, or amendatory or supplemental acts (sec. 16).

Sec. 184. Assigning claims.—Where one has a right to recover from a carrier for damages for overcharges under sections 8 and 9 of the act such right is a property right which may be assigned.¹⁸

Sec. 185. Practice in injunction.—The jurisdiction of the Federal courts to grant restraining orders follows from the general equity jurisdiction of those tribunals. In the exercise of such jurisdiction the court might grant a restraining order, either in the suit brought by the Commission to enforce its order or a suit brought by a carrier to enjoin, set aside, annul, or suspend an order or requirement of the Commission. In the former case, a restraining order could be granted *ex parte*; but in the latter, it is provided by section 16—

that no injunction, interlocutory order or decree,¹⁹ suspending or restraining the enforcement of an order of the Commission shall be granted, except on hearing, after not less than five days notice to the Commission.

This provision is applicable whether or not the certificate of general public importance has been filed in the suit.

In suits brought to enforce an order of the Commission a preliminary injunction will not be granted, if the answer denies the facts:

INSTANCE.—In *I. C. C. v. L. V. R. Co.* (49 Fed., 177), where an answer denies the facts alleged in the complaint, a preliminary injunction will not be granted

¹⁷ Sec. 2 of the expediting act, Appendix, *post*.

¹⁸ *Edmunds v. I. C. R. Co.* (80 Fed., 78).

¹⁹ This language is probably broad enough to cover a restraining order as well

(see also *Shinkle v. L. & N. R. Co.*, 62 Fed., 690; *I. C. C. v. C. N. O. & T. P. R. Co.*, 64 Fed., 981).

A preliminary injunction is usually granted on terms:

INSTANCE.—In *I. C. C. v. C. N. O. & T. P. R. Co.* (64 Fed., 981), in an application made by the complainant that if the defendants are to be permitted, after denial of preliminary injunction, to charge the interdicted rates they be compelled to keep an account with shippers and deposit the excess in court, it was held that such an application ought not to be granted unless there was a showing of right in favor of the complainant to such an extent as would authorize the granting of a preliminary injunction.

And this rule applies whether the suit be for the purpose of enforcing the order of the Commission, or for the purpose of suspending an order, or to prevent the taking effect of a rate or practice in the future.

Sec. 186. Leave of court not necessary to sue receiver.—Prior to the statute of March 3, 1887, it was held that a receiver could not be sued concerning property which he held in a fiduciary capacity without the consent of the appointing court.²⁰ By that act, however, as amended by the act of August 13, 1888, chapter 866, it was provided:

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of an act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same may be necessary to the ends of justice.

Under this section any court having jurisdiction of the parties and the subject-matter may entertain an action where it originates in any transaction by the receiver in carrying on the business connected with the property, and the complainant is not limited to the forum appointing the receiver, nor to a Federal court.²¹

In cases which do not fall clearly under the statutory provision leave to sue the receiver must be obtained.²²

The preservation of general equity jurisdiction over suits instituted

as an interlocutory injunction. "A temporary restraining order is distinguished from an interlocutory injunction in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of an answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court" (*High, Injunctions*, sec. 3).

²⁰ *Davis v. Gray* (16 Wall., 218), *Barton v. Barbour* (104 U. S., 128), *Peale v. Phipps* (14 How., 374).

²¹ *Erb v. Morash* (177 U. S., 584), *T. & P. R. Co. v. Johnson* (151 U. S., 81), *T. & P. R. Co. v. Cox* (145 U. S., 593), *McNulta v. Lockridge* (141 U. S., 327), *Central Trust Co. v. E. T. V. & G. R. Co.* (59 Fed., 523), *St. Nicholas* (49 Fed., 671).

²² *Minot v. Mastin* (95 Fed., 737).

against receivers without leave does not make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction:

INSTANCE.—In *T. & P. R. Co. v. Johnson* (151 U. S., 81) it was said: "The preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion of the ends of justice, make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction; and the right to sue without resorting to the appointing court, which involves the right to obtain judgment, can not be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

Leave of court is not required in order to sue before the Commission:

INSTANCE.—In *Evans v. U. P. R. Co.* (6 I. C. C., 520) the Commission held that prior leave of court appointing a receiver was not necessary to entitle a shipper to complain in a petition to the Commission, and, further, that such leave is not necessary to give the Commission jurisdiction in a proceeding. In this case the carrier was made a party defendant, and subsequently a receiver was appointed therefor. An order was made by the Commission substituting the receiver a party defendant and directing service of the complaint and notice to satisfy it or file answer within the usual time.

Sec. 187. Removal of causes from State court to Federal court.—As has been seen,²³ a State court has no jurisdiction to take cognizance of rights granted by the interstate commerce acts, and where a State court has no jurisdiction the Federal court can have no jurisdiction on removal. Where, however, a State court has jurisdiction of a matter involving interstate commerce, being for the enforcement of rights not granted by the act, such suit may be removed to the Federal courts upon compliance with the usual rules respecting the removal of causes.²⁴

Sec. 188. Special counsel.—The Commission is authorized, under section 16, with the consent of the Attorney-General, to employ special counsel in any proceeding under the act, the expenses of such employment to be paid out of the appropriation for the Commission. Under such authorization the Commission from time to time, as occasion requires, employs special counsel. The more frequent instances at present are to defend suits brought to set aside, annul, or suspend an order of the Commission. The attorney for the complainant before the Commission is usually employed because of his knowledge of the facts of the case.

²³ See sec. 156. For practice on removal the standard works on Federal procedure may be consulted.

²⁴ Governed by act of August 13, 1888, c. 866 (25 Stat. L., 433), amending act of March 3, 1875.

Sec. 189. Attorneys' fees.—One in whose favor the Commission has made an order for the payment of money and who has brought an action in the circuit court for the enforcement thereof, if he shall prevail, is, by section 16, to be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

CHAPTER XI

EVIDENCE BEFORE THE COURTS

Sec. 190. Rules of evidence prescribed by the acts.—The rules of evidence prescribed by the interstate commerce acts are:

(a) Under the provisions of section 14 the “authorized publications [of the Commission] shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States¹ and of the several States² without any further proof or authentication thereof;”

(b) Under the provisions of section 16, “the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated,” in proceedings brought in the circuit courts for the enforcement of an order for the payment of money;³

(c) Under section 16 the registry mail receipt shall be *prima facie* evidence of the receipt of such order (of the Commission) by the carrier in due course of mail;

(d) Under the provisions of section 16 “the copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission * * * and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to

¹The right of Congress to prescribe rules of evidence for the Federal courts does not seem to be open to question. It has been provided that in trials at common law the local rules of evidence shall prevail, and this provision has been held binding, although some cases have asserted a right to disregard the provision (*Connecticut, etc., Ins. Co. v. Union, etc., Co.*, 112 U. S., 255; *Remington v. Linthicum*, 14 Pet., 91; *Bucher v. Cheshire R.*, 125 U. S., 583; *Hinds v. Keith*, 57 Fed., 10; *Stewart v. Morris*, 89 Fed., 290; *U. P. R. Co. v. Reed*, 80 Fed., 239; *Loneragan v. Miss. Co.*, 5 Fed., 778; *Albro v. Manhattan, etc., Ins. Co.*, 119 Fed., 629; *Belding v. Hebard*, 103 Fed., 532; *Parker v. Moore*, 11 Fed., 470). Cases disregarding the right are *U. P. R. Co. v. Yates* (79 Fed., 589), and *Shea v. Leisy* (85 Fed., 245).

²Similar provisions relating to editions of Federal Statutes are in sec. 908, Revised Statutes.

³In *C. H. & D. R. Co. v. I. C. C.* (206 U. S., 142) the Court said: “The statute gives *prima facie* effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed” citing *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184), and *L. & N. R. Co. v. Behlmer* (175 U. S., 648), affirmed in *I. C. R. Co. v. I. C. C.* (206 U. S., 441).

be for the purpose of investigations by the Commission and in all judicial proceedings;”

(e) Under the provisions of section 16 “copies or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid (see preceding paragraph), certified by the secretary under its [Commission’s] seal, shall be received in evidence with like effect as the originals;”

(f) Under the provisions of section 20 the receipt, judgment, or transcript of the amount paid by an initial carrier for loss, damage, or injury to property may serve as evidence on behalf of said initial carrier to recover from the carrier on whose line the loss, damage, or injury occurred.

(g) Under the provisions of section 1 of the Elkins law the filed and published rates in any prosecution under that law as against the carrier, its officers, or agents, “shall be conclusively deemed to be the legal rate.”⁴

(h) Under the provisions of section 17 that the official seal of the Commission shall be judicially noticed.

Sec. 191. Competency of witnesses.—The competency of witnesses in civil cases in the Federal courts is now governed by the provisions of the act of June 29, 1906,⁵ reading:

The competency of a witness to testify in any civil action, suit or proceeding, in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held.⁶

Sec. 192. Compelling attendance of witnesses before Commission.—The courts are authorized, under section 12 of the act, to require the attendance of witnesses before the Commission to give testimony; and, under the same section, in the case of contumacy or refusal to obey a subpoena, the circuit court may issue an order requiring the person to appear and give evidence touching the matter in question.

This provision of the law is coupled with one of the immunity provisions (see section 146), for the witness usually obeys the subpoena but declines to testify on the ground that the evidence might incriminate him.

Where the witness refuses to testify there are framed a sufficient number of questions to indicate the purpose of the particular por-

⁴ The constitutional right of the legislature to provide a conclusive rule of evidence must be doubted, particularly in criminal cases, as such a rule, if strictly enforced, would prevent the prisoner from introducing evidence tending to show want of intent, or even to show the attending facts and circumstances; and, further, such a rule would deny to the prisoner the presumption of innocence. See instructive note by A. C. Freeman, editor American State Reports (*People v. Cannon*, 139 N. Y. 32; 36 Am. St. Rep.).

⁵ “An act to amend section 158 of the Revised Statutes of the United States.”

⁶ The statutes affecting the qualifications of witnesses in the State courts will be found briefed in *Wigmore on Evidence*, section 488.

tion of the examination. To each of the questions the witness usually declines to answer on the ground stated.

While the statute provides (sec. 12) that the Commission or any party to a proceeding may invoke the aid of the court yet the proceedings are usually instituted by the Commission.

The proceeding is initiated by filing in the circuit court a petition setting up the organization of the Commission, the subject-matter of the investigation, whether a general investigation brought by the Commission or a proceeding with parties complainant and defendant, and such an abstract of the evidence as tends to show the materiality and relevancy of the questions which have been propounded to the witness and which he refuses to answer and concludes with a prayer for the order in accordance with the statute.

Such a proceeding to compel the attendance of witnesses before the Commission is not unconstitutional because imposing nonjudicial duties upon the court, and the proceeding constitutes a case or controversy to which the judicial power of the United States extends.⁷

Where there are several witnesses a single petition may suffice, for the court can issue separate orders in each case.⁸

Sec. 193. Evidence in civil and criminal cases.—The rules of evidence in criminal cases in Federal courts are the rules existing in the several States at the adoption of the judiciary act (1789), as modified by subsequent acts of Congress.

The judiciary act of 1789, chapter 20, section 34, provided:

The laws of the several States, except where the Constitution, treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in Courts of the United States, in cases where they apply.

Sections 858⁹ and 721¹⁰ of the Revised Statutes have been held not

⁷ *I. C. C. v. Brimson* (154 U. S., 448), reversing the judgment of the circuit court of the United States for the northern district of Illinois (53 Fed., 476).

⁸ *I. C. C. v. P. & R. R. Co.* (123 Fed., 970).

⁹ Section 858, Revised Statutes: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

By the act of June 29, 1906 (34 Stat. L., 618), this section was amended so as to read: "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be terminated by the laws of the State or Territory in which the court is held."

¹⁰ Section 721, Revised Statutes, is the same as section 34, judiciary act of 1789, quoted *supra*.

to apply to criminal cases, upon the ground that criminal cases are not included under the term "trials at common law." The result is, as stated by Wigmore¹¹ that "the Federal rules for criminal trials are determinable by an artificial and unpractical test, which merely creates useless obscurity."

The rules of evidence applicable in equity proceedings are those of the respective States where the cause is held, under the provisions of section 858, Revised Statutes:

In all other respects [save the qualifications of witnesses] the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

This provision has generally received a narrow construction by the Federal courts, and it is doubted if any general rules can be laid down concerning the relevancy and materiality of evidence in the Federal courts other than is found in standard works upon evidence and the decisions.

The rules respecting the manner of taking evidence in equity proceedings is provided by the statutes of the United States and Rules of the Supreme Court.¹²

¹¹ Wigmore on Evidence, sec. 6.

¹² Section 862, Revised Statutes: "The mode of proof in causes of equity * * * shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

Rules of the Supreme Court: "Rule 67. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the Commission; and if no cross-interrogatories are filed at the expiration of the time the Commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

"Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

"Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in the common-law courts.

"The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that by consent of parties, examiner may take down the testimony of any witness in the form of narrative.

"At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, That such stenographer or typewriter has been appointed by the court, or is approved by both parties.

"The testimony of each witness, after such reduction to writing, shall be read over to him, and signed by him in the presence of the examiner and of such of

Sec. 194. Immunity of witnesses.—The cases¹³ brought to compel answer to questions propounded by the Commission are:

United States v. Brine (District Court, Ohio).—October 15, 1890, proceeding for contempt; October 16, 1890, rule discharged.

In re Counselman (District Court, Illinois).—December 11, 1890, application for habeas corpus denied; January 11, 1892, appellant discharged from custody by order of United States Supreme Court (44 Fed., 268; 142 U. S., 547).

In re Peasley (District Court, Illinois).—December 11, 1890, application for habeas corpus denied; January 11, 1892, prisoner discharged, following the Counselman case (44 Fed., 271).

In re Brimson (Circuit Court, Illinois).— ———, 1892, application for order to answer questions denied; May 26, 1894, Supreme Court reversed circuit court and remanded cause for further proceedings (53 Fed., 476; 153 U. S., 447).

In re Brown (Circuit Court, Pennsylvania).—May 6, 1895, adjudged guilty of contempt; November —, 1895, application for habeas corpus denied; March 23, 1896, Supreme Court affirmed the circuit court in its action whereby Brown was ordered to jail for refusing to testify on the ground of self-crimination (Sub. nom. *Brown v. Walker*, 161 U. S., 591; 70 Fed., 46).

I. C. C. v. Baird (Circuit Court, New York).—April 22, 1903, Baird and others, agents of certain coal roads, declined to give testimony before the Commission in the Hearst anthracite coal-rate investigation; June 12, 1903, circuit court denied the motion to require defendants to answer the questions; April 4, 1904, Supreme

the parties or counsel as may attend; provided that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

“The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions, which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions or parts of them, as may be just.

“In case of refusal of witnesses to attend, to be sworn, or to answer any questions put by the examiner or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

“Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

“When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

“Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

“Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter in which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

“The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

“Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.”

¹³ For immunity of witnesses generally, see sec. 146, *ante*.

Court reversed the circuit court and remanded the cause for further proceedings. In this case further construction of the Elkins law was made (123 Fed., 969; 194 U. S., 25).

In re Reichman (District Court, Illinois).— ———, 1905, Reichman, an officer of Street's Western Car Lines, refused to answer certain questions put to him by Commission. The proceedings involved excessive charges of private car lines. Reichman contended that Elkins law did not apply to private car lines; ———, 1905, proceedings instituted in court to compel Reichman to testify; February 27, 1906, court ordered Reichman to answer the questions, and construed the Elkins law against his contention (145 Fed., 235).

Sec. 195. Weight of evidence of opinion of Commission.—Section 16 of the act provides that where the Commission has made an order for the payment of money, and a bill has been filed to enforce the order—that on a trial of such suit the findings [of fact] and order of the Commission shall be *prima facie* evidence of the facts therein stated.¹⁴

The present statute is silent upon the weight to be given to a report and order of the Commission, where such order is other than for the payment of money.¹⁵ Former section 16 provided that in matters involving an order or requirement founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution—

at the trial of (*sic*) the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated.

If the order was not founded upon a controversy, requiring a trial by jury, the proceeding was an equitable one, and upon the hearing the findings of fact were made *prima facie* evidence.¹⁶

Mr. Justice Story defined, in *Keely v. Jackson* (6 Pet., 622), *prima facie* evidence as follows:

It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new

¹⁴ Under a similar provision of the former section it was held that where a demurrer was interposed the findings of the Commission will be liberally construed (*I. C. C. v. C. B. & Q. R. Co.*, 94 Fed., 272).

¹⁵ While the statute is silent upon this subject yet, if the proceedings be shown to be regular, the courts will doubtless give great weight, not to say consider as *prima facie* evidence, the findings of fact of the Commission. This on the ground that the Commission are experts. Certainly such weight will be given to the report of the Commission as is ordinarily accorded to the report of an examiner in chancery.

¹⁶ The findings of the Commission being made *prima facie* evidence other evidence may be interposed to overcome them (*I. C. C. v. A. T. & S. F. R. Co.*, 149 U. S., 264; *I. C. C. v. L. V. R. Co.*, 49 Fed., 177; *I. C. C. v. L. & N. R. Co.*, 73 Fed., 409; *I. C. C. v. S. R. Co.*, 117 Fed., 741; *I. C. C. v. A. T. & S. F. R. Co.*, 50 Fed., 295; *I. C. C. v. C. N. O. & T. P. R. Co.*, 56 Fed., 925; *I. C. C. v. E. T. V. & G. R. Co.*, 85 Fed., 107; *I. C. C. v. C. N. O. & T. P. R. Co.*, 64 Fed., 904; *Ky. & I. B. Co. v. L. & N. R. Co.*, 37 Fed., 272; *U. S. v. M. P. R. Co.*, 65 Fed., 903), and it was held in *I. C. C. v. L. V. R. Co.* (49 Fed., 177) that no additional weight is to be given the report and order of the Commission because the Commission was the complainant.

trial if, under such circumstances, without rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject.

Sec. 196. Introduction into court of testimony given before the Commission.—In cases brought before the Federal courts either to enforce an order of the Commission or to set aside, enjoin, suspend, or annul an order or requirement it is customary that much of the evidence adduced before the Commission be made, by stipulation of counsel, a part of the record of the court.¹⁷ This practice has advantages in that the expense of witnesses before the court or before a master is lessened; also the time of the court or master and counsel is conserved. Such evidence forms, in a measure, the case in chief of the complainant, but one is not limited to the evidence thus introduced. The right to introduce additional evidence¹⁸ exists subject to the usual rules of materiality, particularly in cases brought to enforce an order of the Commission for such a proceeding as a proceeding *de novo*.¹⁹

Evidence taken before the Commission is not a part of the court record but may be introduced by either party:

INSTANCE.—In *I. C. C. v. C. N. O. & T. P. R. Co.* (64 Fed., 981) it was held that evidence taken before the Commission is not a part of the record of the court, but either party to the court proceeding may introduce testimony taken before the Commission which is competent and relevant.

Sec. 197. Certified copies to be admitted as evidence.—It is provided by section 16 of the act that the copies of schedules, tariffs, and other documentary evidence filed with the Commission are to be preserved as public records in the custody of its secretary and for the purpose of investigations by the Commission and in all judicial proceedings shall be received as *prima facie* evidence of what they purport to be. It is also provided that copies of or extracts from such documentary evidence, which is made a public record, if certified by the secretary under the seal of the Commission, shall be received in evidence with like effect as the originals.

Little difficulty can arise where a copy of an entire document is

¹⁷ As in *I. C. C. v. L. S. & M. S. R.* (134 Fed., 942) and in *S. R. Co. v. Tift*, (138 Fed., 753), where it was stipulated by counsel that the testimony, including the exhibits taken before the Commission, should be filed in the case, subject only to objections to its relevancy.

¹⁸ The former practice of the carriers of withholding evidence before the Commission, introducing it only when the matter in controversy had been brought before the court, was condemned by the Supreme Court in *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184). See sec. 149, *ante*.

¹⁹ *Ky. & I. B. Co. v. L. & N. R. Co.* (37 Fed., 567), *I. C. C. v. C. N. O. & T. P. R. Co.* (56 Fed., 925), affirmed in 162 U. S., 184.

produced. Occasions arise, however, where extracts are made, which may or may not accurately furnish complete evidence of the point desired. Thus, an entire tariff will not ordinarily be certified to if a copy must be made; if a printed copy is available it may be certified. Where one desires to prove the correct rate applying between particular points upon a commodity the question is often one of doubt, owing to the complexity of tariffs and the numerous exceptions to the general rules. The recent movement for the simplification of tariffs, if accomplished, will minimize the difficulties here mentioned. At present, however, it is not infrequent that doubt arises concerning what is the correct and legal rate.

Sec. 198. Judicial notice of seal of Commission.—The courts are, by the provisions of the act (secs. 16 and 17), required to take judicial notice of the seal of the Commission.

The practice in certifying to copies of schedules, tariffs, contracts, and statistics from the annual reports of carriers is for the secretary of the Commission to certify that the papers to which the certificate is attached are true copies of the originals now on file in the office of the Commission, whether the same be a report and order of the Commission or copies of documents filed with the Commission.

Sec. 199. Accident reports not to be used as evidence.—The act regulating commerce provides, in section 20, that the carriers subject to the act shall report “the accidents to passengers, employees, and other persons, and the causes thereof.”

The act approved March 3, 1901,²⁰ provides for the filing of monthly reports of accidents, and for a penalty for failure to make reports. Section 3 of the last-mentioned act provides:

That neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad so making such report in any suit or action for damages growing out of any matter mentioned in said report.

Sec. 200. Fees of witnesses.—Witnesses before the courts are entitled to the fees provided by law.²¹

²⁰ An act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission, approved March 3, 1901 (31 Stat. L., 1446). The other safety-appliance acts are an act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, etc., approved Mar. 2, 1893 (27 Stat. L., 531), as amended by an act approved April 1, 1896 (29 Stat. L., 85), an act to amend an act entitled an act to promote the safety of employees and travelers, etc., approved March 2, 1893, and amended April 1, 1896, approved March 2, 1903 (32 Stat. L., 943).

²¹ Sec. 848, Revised Statutes. See sec. 145, *ante*.

CHAPTER XII

APPEAL AND ERROR

Sec. 201. Appeal in criminal cases.—The interstate commerce act makes no provision concerning appeals or the expedition of cases where a criminal prosecution for alleged violation of the law has been brought. The special provisions relating to appeals and the expedition of suits apply only to the civil proceedings. It follows, therefore, that the general rules relating to appeals, finality of decision, and other matters apply to criminal cases brought under the acts.¹

Sec. 202. Appeals direct to the Supreme Court.—

UNDER THE ACT OF MARCH 3, 1891

Under section 5 of the act² establishing the circuit courts of appeals it is provided that appeals or writs of error may be taken from the district, or from the existing circuit courts to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

* * * * *

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

UNDER THE ACT OF FEBRUARY 11, 1903

Under the expediting act, the provisions of which are made applicable to proceedings under the act to regulate commerce, it is provided:

That in every suit in equity pending or hereafter brought in any circuit court

¹ These rules will be found in any of the standard works on Federal practice. An effort has been made to permit the Government to appeal in criminal cases, as is allowed in several of the States.

² In *I. C. C. v. A. T. & S. F. R. Co.* (149 U. S., 264) it was held that former section 16, giving to the Commission a summary proceeding in court to enforce its order, was repealed by the judiciary act of March 3, 1891 (26 Stat. L., 826) in so far as it allowed an appeal direct to the Supreme Court when the matter in dispute exceeded \$2,000, and that the appeal should be taken to the circuit court of appeals.

of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

The provisions of this act are, by section 16 of the act to regulate commerce, made applicable to suits brought against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission, and also to other proceedings in equity to enforce an order or requirement of the Commission, or any of the provisions of the act to regulate commerce. The provisions are also made applicable to cases brought by the Attorney-General in the name of the Interstate Commerce Commission, under section 3 of the Elkins' law, to prevent transportation at less than the published rates on file or any discrimination forbidden by law.

UNDER THE INTERSTATE COMMERCE ACT

The provisions of the act to regulate commerce respecting appeals are to be found in section 16:

(a) From any action upon such petition [in a circuit court for the enforcement of an order of the Commission other than for the payment of money] an appeal shall lie by either party [i. e., Interstate Commerce Commission or party injured thereby, or defendant carrier] to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

(b) An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit [i. e., brought to enjoin, set aside, or annul, or suspend any order or requirement of the Commission], but shall lie only to the Supreme Court of the United States.

(c) The appeal [from an interlocutory order or injunction] must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of a like character and criminal causes.

UNDER THE ELKINS' LAW

In suits brought by the Attorney-General at the request of the Interstate Commerce Commission, to prevent transportation at less than the tariffs on file and discriminations forbidden by law, the order, writ, or process of the circuit court is "subject to the right of appeal as now provided by law."

The appeals provided by law at the passage of the act of February 19, 1903, were the general statutes on that subject and the provisions of the then section 16 of the act to regulate commerce, as amended by

act of March 2, 1889. That section provided for cases in the circuit courts:

(a) Not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States.

(b) Founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution.

In the former class of cases it was provided that—

When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said [circuit] court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon.

In cases founded upon a controversy requiring a trial by jury it was provided that—

If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court.

The Supreme Court will not disturb findings of fact concurred in by the courts below:

INSTANCE.—In *C. N. O. & T. P. R. Co. v. I. C. C.* (162 U. S., 184) the Supreme Court declined to review the question of fact as to whether the circumstances and conditions were so dissimilar as to justify the rates charged in a particular case, or to review a question as to the reasonableness of rates, when the circuit court and the circuit court of appeals had concurred in finding the existing rate reasonable.

But if the circumstances which should have been considered have not been, the cause will be reversed and remanded:

INSTANCE.—In *T. & P. Co. v. I. C. C.* (162 U. S., 197) it was held that a carrier is entitled to have considered all the legitimate circumstances and conditions which should properly be passed upon by the Commission, and if the courts are of opinion that the Commission has erred in excluding certain circumstances (as ocean competition) from consideration it should have reversed the decree of the trial court, set aside the Commission's order, and remanded the cause to the Commission, to proceed in accordance with law.

Sec. 203. Appeals to the circuit courts of appeals.—Appeals to the circuit court of appeals are provided for by sections 6 and 7 of the act establishing those courts (act of March 3, 1891):

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws,

under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.

But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

Sec. 204. Costs on appeal.—The usual rules respecting costs upon appeal are changed, in that by the provisions of section 16, where a petitioner has instituted a suit to compel obedience to an order of the Commission for the payment of money, he is not liable for costs, either in the court below or at any subsequent stage of the proceedings unless they accrue upon his appeal.

APPENDIX

THE ACTS TO REGULATE COMMERCE

The acts to regulate commerce, with citations, are given below; for other acts under which the Commission has jurisdiction or authority see Chapter IV, pages 51-64.

Act to regulate commerce:

An act to regulate commerce, approved February 4, 1887, and in effect April 5, 1887 (24 Stat. L., 379; 1 Supp. R. S., 529), as amended by an act approved March 2, 1889 (25 Stat. L., 855; 1 Supp. R. S., 684), and by an act approved February 10, 1891 (26 Stat. L., 743; 1 Supp. R. S., 891), and by an act approved February 8, 1895 (28 Stat. L., 643; 2 Supp. R. S., 369), and by an act approved June 29, 1906 (34 Stat. L., 584), and by a joint resolution approved June 30, 1906 (34 Stat. L., 838), and by an act approved April 13, 1908 (35 Stat. L., 60).

Acts relating to testimony:

An act in relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled an act to regulate commerce, and amendments thereto, approved February 11, 1893 (27 Stat. L., 443; 2 Supp. R. S., 80).

An act defining the right of immunity of witnesses under the act entitled an act in relation to testimony before the Interstate Commerce Commission, and so forth, approved February 11, 1893, and an act entitled an act to establish the Department of Commerce and Labor, approved February 14, 1903, and an act entitled an act to further regulate commerce with foreign nations and among the States, approved February 19, 1903, and an act entitled an act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1904, and for other purposes, approved February 25, 1903, approved June 30, 1906 (34 Stat. L., 798).

Elkins act:

An act to further regulate commerce with foreign nations and among the States, approved February 19, 1903 (32 Stat. L., 847), as amended by an act approved June 29, 1906 (34 Stat. L., 584).

Expedition act:

An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled an act to protect trade and commerce against unlawful restraints and monopolies, an act to regulate commerce, or any other acts having a like purpose that may be hereafter enacted, approved February 11, 1903 (32 Stat. L., 823).

DIGEST OF THE ACT TO REGULATE COMMERCE

[As amended.]

SECTION 1:

Carriers and transportation subject to the law.
Law does not apply to transportation wholly within one State.
Express and sleeping car companies included.
Definition of "railroad" and "transportation".
Free passes and transportation prohibited. (Compare section 22.)
Excepted classes respecting free transportation.
Interchange of passes authorized.
Meaning of "employees and families".
Jurisdiction and penalty for violation of pass provision.
Railroad companies prohibited from transporting commodities
in which they are interested, timber and its products excepted.
Switch connections may be ordered by the Commission.

SECTION 2:

Unjust discrimination defined and forbidden.

SECTION 3:

Undue or unreasonable preference or advantage unlawful.
Facilities for interchange of traffic must be furnished.
Discrimination between connecting lines forbidden.

SECTION 4:

Long and short haul section.
Commission has authority to relieve carriers from the operation
of this section.

SECTION 5:

Pooling of freights and division of earnings forbidden.

SECTION 6:

Printing and posting of schedules of rates, fares, and charges,
including rates and regulations affecting the same, icing, stor-
age, and terminal charges, and freight classifications.
Printing and posting of schedules of rates on freight carried
through a foreign country.
Freight subject to customs duties in case of failure to publish
through rates.
Thirty days' public notice of change in rates must be given.
Commission may modify requirements of this section.

SECTION 6—Continued:

Joint tariffs must specify names of carriers participating.

Evidence of concurrence.

Copies of contracts, agreements, or arrangements, relating to traffic must be filed with Commission.

Commission may prescribe forms of schedules.

Prohibited to engage in transportation unless carrier files and publishes rates, fares and charges thereon.

Published rates not to be deviated from.

“Carrier” means “common carrier.”

Preference and expedition of military traffic in time of war.

SECTION 7:

Continuous carriage provided for.

SECTION 8:

Liability of common carriers for damages.

SECTION 9:

Persons claiming to be damaged may elect to complain to the Commission or bring suit in a United States court.

Officers or defendant may be compelled to testify.

SECTION 10:

Penalties for violations of act by carriers, or when the carrier is a corporation, its officers, agents, or employees; fine and imprisonment.

Penalties for false billing, etc., by carriers, their officers, or agents; fine and imprisonment.

Penalties for false billing, etc., by shippers and other persons; fine and imprisonment.

Penalties for inducing common carriers to discriminate unjustly; fine and imprisonment, joint liability with carrier for damages.

SECTION 11:

Interstate Commerce Commissioners, how appointed. (Compare section 24.)

SECTION 12:

Power and duty of Commission to inquire into business of carriers and keep itself informed in regard thereto.

Commission required to execute and enforce provisions of this act.

Duty of district attorney to prosecute under direction of Attorney-General.

Costs and expenses of prosecution to be paid out of appropriations for courts.

SECTION 12—Continued:

Power of Commission to require attendance and testimony of witnesses and production of documentary evidence.

Commission may invoke aid of courts to compel witnesses to attend and testify.

Penalty for disobedience to order of the court.

Claim that testimony or evidence will tend to criminate will not excuse witness. (Compare act of February 11, 1893, and act of February 25, 1903.)

Testimony may be taken by deposition.

Commission may order testimony to be taken by deposition.

Reasonable notice must be given.

Testimony by deposition may be compelled in the same manner as above specified.

Manner of taking deposition.

When witness is in a foreign country.

Depositions must be filed with the Commission.

Fees of witnesses and magistrates. (See sec. 848, R. S.)

SECTION 13:

Who may complain; how served upon carriers.

Reparation by carriers before investigation.

Investigations of complaints by the Commission.

State railroad commissions may complain.

Institution of inquiries by the Commission on its own motion.

Complainant need not be directly damaged.

SECTION 14:

Commission must make report of investigations, stating its conclusions and order.

Reparation.

Reports of investigations must be entered on record; service of copies on parties.

Reports and decisions; authorized publication competent evidence.

Publication and distribution of annual reports of Commission.

SECTION 15:

Commission may determine and prescribe just and reasonable rates to be observed as maximum charges.

Commission may determine and prescribe just and reasonable regulations or practices; Commission may order carriers to cease and desist from full extent of violations found; orders of the Commission effective as prescribed but in not less than thirty days.

SECTION 15—Continued:

Orders shall continue in force not exceeding two years, unless suspended or set aside by Commission or court.

When carriers fail to agree on divisions of joint rate Commission may prescribe proportion of such rate to be received by each carrier.

Commission may establish through routes and joint rates.

Commission may determine just and reasonable charge or allowance for service rendered by owner of property transported or for any instrumentality furnished by such owner and used in such transportation.

Enumeration of powers in this section not exclusive.

SECTION 16:

Award of damages by Commission.

Petition to United States court in case carrier does not comply with order for payment of money.

Findings of fact of Commission shall be prima facie evidence in reparation cases; petitioner not liable for costs in circuit court.

Petitioners' attorneys fees.

Limitation of actions.

Accrued claims.

Joint plaintiffs may sue joint defendants in courts on awards of damages.

Service of process.

Service of order of Commission by mailing.

Commission may suspend or modify order.

Carriers, their agents and employees, must comply with such order.

Punishment by forfeiture for refusal to obey order of Commission under section 15.

Forfeiture payable into Treasury and recoverable in civil suit.

Duty of district attorneys to prosecute.

Costs and expenses to be paid out of appropriations for court expenses.

Commission may employ special counsel.

Petition to United States court in cases of disobedience to order of Commission other than for payment of money; jurisdiction of court.

Court must enforce disobeyed order if regularly made and duly served.

Appeal to Supreme Court of the United States.

Venue of suits brought against Commission to enjoin, set aside, annul or suspend order of Commission.

SECTION 16—Continued:

Provisions of expediting act to apply.

Appeal to Supreme Court; priority of case in Supreme Court.

No injunction or interlocutory order to be granted except after not less than five days' notice.

Appeal to Supreme Court from interlocutory order or decree in thirty days.

Rate schedules, contracts or agreements, and carriers' annual reports filed with Commission and in custody of secretary are public records receivable in courts and by the Commission as *prima facie* evidence.

Certified copies or evidence therefrom also *prima facie* evidence.

SECTION 16a:

Commission may grant rehearings.

Application for rehearing shall not operate as stay of proceedings unless so ordered by Commission.

SECTION 17:

Commission may, on rehearing, reverse, change or modify order.

Interstate Commerce Commission; form of procedure.

Parties may appear before the Commission in person or by attorney.

Official seal.

SECTION 18:

Salaries of Commissioners. (Compare section 24.)

Secretary, how appointed; salary.

Employees.

Offices and supplies.

Witnesses' fees. (See section 848, R. S.)

Expenses of the Commission, how paid.

SECTION 19:

Principal office of the Commission.

Sessions of the Commission.

Commission may prosecute inquiries by one or more of its members in any part of the United States.

SECTION 20:

Carriers subject to act and owners of railroads engaged in interstate commerce must render full annual reports to Commission; and Commission is authorized to prescribe manner in which reports shall be made and require specific answers to all questions.

What reports of carriers shall contain.

Commission may prescribe uniform system of accounts and manner of keeping accounts.

SECTION 20—Continued:

Annual reports to be filed with Commission by September 30 of each year.

Commission may grant additional time.

Punishment by forfeiture for failure to file.

Commission may require filing of monthly and special reports.

Punishment by forfeiture for failure to file special reports.

Oaths to annual reports, how taken.

Commission may prescribe forms of accounts, records and memoranda, and have access thereto.

Carrier can not keep other accounts than those prescribed by Commission.

Commission may employ special examiner to inspect accounts and records.

Punishment of carrier by forfeiture for failure to keep accounts or records as prescribed by Commission or allow inspection of accounts or records.

Punishment of person for false entry in accounts or records, or mutilation of accounts or records, or for keeping other accounts than those prescribed by Commission; fine or imprisonment or both.

Punishment of special examiner who divulges facts or information without authority; fine or imprisonment, or both.

United States court may issue mandamus or compel compliance with provisions of act.

Commission may employ special agents or examiners to administer oaths, examine witnesses and receive evidence.

Receiving common carrier liable for loss or damage on through shipments carried by it or by any connection, irrespective of contract to contrary.

Remedies under existing law not barred.

Initial carrier may have recourse upon carrier responsible for loss or damage.

SECTION 21:

Annual reports of the Commission to Congress.

SECTION 22:

Persons and property that may be carried free or at reduced rates. (Compare section 1.)

Mileage, excursion, or commutation passenger tickets.

Passes and free transportation to officers and employees of railroad companies.

Provisions of act are in addition to remedies existing at common law; pending litigation not affected by act.

SECTION 22—Continued:

Joint interchangeable 5,000-mile tickets; amount of free baggage.

Publication of rates.

Sale of tickets.

Penalties.

SECTION 23:

Jurisdiction of United States courts to issue writs of mandamus commanding the movement of interstate traffic or the furnishing of cars or other transportation facilities.

Peremptory mandamus may issue notwithstanding proper compensation of carrier may be undetermined.

Remedy cumulative and shall not interfere with other remedies provided by the act.

SECTION 24:

Commission to consist of 7 members; terms; salaries. (Compare section 11.)

Qualifications and enlargement of Commission.

ADDITIONAL PROVISIONS OF ACT, JUNE 29, 1906

SECTION 9:

Existing laws as to attendance of witnesses and production of evidence applicable in proceedings under this act.

SECTION 10:

Conflicting laws repealed.

Amendments not to affect causes pending in court.

SECTION 11:

Act effective after passage.

JOINT RESOLUTION

Time of taking effect extended to August 28, 1906.

THE ACT TO REGULATE COMMERCE

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SEC. 1. (As amended June 29, 1906.) That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad," as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the

duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed while in the service of any such common carrier.* Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that pro-

*This proviso is act of April 13, 1908 (35 Stat. L., 60).

vided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof. (*See section 22.*)

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traf-

fic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 6. (*Amended March 2, 1889. Following section substituted June 29, 1906.*) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise

change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection.

tion shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any Act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to

pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 10. (*As amended March 2, 1889.*) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall

knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. (*See section 24, enlarging Commission and increasing salaries.*)

SEC. 12. (*As amended March 2, 1889, and February 10, 1891.*)

That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation.

Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14. (*Amended March 2, 1889, and June 29, 1906.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are

awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

SEC. 15. (*As amended June 29, 1906.*) That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of

this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.¹

SEC. 16 (*Amended March 2, 1889. Following section substituted June 29, 1906.*) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's

¹ Former section 15, read: "That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law."

fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect,

any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction and also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforce-

ment of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

SEC. 16a. (*Added June 29, 1906.*) That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SEC. 17. (*As amended March 2, 1889.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Com-

mission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

SEC. 18. (*As amended March 2, 1889.*) [*See Section 24, increasing salaries of Commissioners.*] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars,* payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

SEC. 20. (*As amended June 29, 1906.*) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and

*Increased to \$5,000 by sundry civil act of March 4, 1907 (34 Stat. L., 1311).

other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or exam-

iners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose

line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

SEC. 21. (*As amended March 2, 1889.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

SEC. 22. (*As amended March 2, 1889, and February 8, 1895.*) [*See section 1, 4th par.*]. That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other

joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

NEW SECTION. (*Added March 2, 1889.*) [Sec. 23.] That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

SEC. 24. (*Added June 29, 1906.*) That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

(*Additional provisions in Act of June 29, 1906.*) (SEC. 9.) That all existing laws relating to the attendance of witnesses and the pro-

duction of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

(SEC. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

(SEC. 11.) That this Act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the act entitled 'An act to amend an act, entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

Public No. 41, approved February 4, 1887, as amended by Public No. 125, approved March 2, 1889, and Public No. 72, approved February 10, 1891. Public No. 38, approved February 8, 1895. Public No. 337, approved June 29, 1906. Public Res., No. 47, approved June 30, 1906. Public No. 95, approved April 13, 1908.

THE IMMUNITY ACT

AN ACT In relation to testimony before the Interstate Commerce Commission, and in cases or proceedings under or connected with an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and amendments thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided,* That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

Public No 54, approved February 11, 1903.

ACT DEFINING RIGHT OF IMMUNITY

AN ACT Defining the right of immunity of witnesses under the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, and an act entitled, "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and an act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and an act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Public No. 389, approved June 30, 1906.

DIGEST OF ELKINS' LAW

[As amended.]

SECTION 1:

Carrier corporation as well as officer or agent liable to conviction for misdemeanor.

Penalty.

Failure of carrier to publish rates or observe tariffs a misdemeanor.

Penalty, fine.

Misdemeanor to offer, grant, give, solicit, accept or receive any rebate from published rates or other concessions or discrimination.

Penalty, fine or imprisonment, or both.

Judicial district in which cases may be prosecuted.

Act of officer or agent to be also deemed act of carrier.

Rates filed or participated in by carrier shall, as against such carrier, be deemed legal rate.

Forfeiture, in addition to other prescribed penalty, of three times amount of money and value of consideration illegally received shall be paid to the United States.

Attorney-General to collect such for forfeiture by civil action.

Period covered to be six years prior to commencement of action.

SECTION 2:

Persons interested in matters involved in cases before Interstate Commerce Commission or circuit court may be made parties and shall be subject to orders or decrees.

SECTION 3:

Proceedings to enjoin or restrain departures from published rates or any discrimination prohibited by law against carriers and parties interested in traffic.

Such proceedings shall not prevent actions for recovery of damages or other action authorized by act to regulate commerce or amendments thereof.

Compulsory attendance and testimony of witnesses and production of books and papers.

Immunity to witnesses.

Expediting act of February 11, 1903, to apply in cases prosecuted under direction of Attorney-General in name of Interstate Commerce Commission.

SECTION 4:

Conflicting laws repealed.

THE ELKINS' LAW

[As amended.]

AN ACT To further regulate commerce with foreign nations and among the States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SEC. 1. (As amended June 29, 1906.) That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conduct-

ed; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the

same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said act approved February fourth, eighteen hundred and eighty-seven, entitled An act to regulate commerce and the acts amendatory thereof. And in proceedings under this act and the acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such proceeding: *Provided*, That the provisions of an act entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the

Attorney-General in the name of the Interstate Commerce Commission.

SEC. 4. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed, but such repeal shall not affect causes now pending, nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this act.

SEC. 5. That this act shall take effect from its passage.

Public No. 103, approved February 19, 1903.

EXPEDITING ACT

AN ACT¹ To expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public No. 82, approved February 11, 1903.

¹This act is made applicable to suits brought to enjoin the operation of an order of the Commission. (See act to regulate commerce, sec. 16.)

STREET RAILWAYS IN THE DISTRICT OF COLUMBIA

[Part of an act conferring certain powers on the Interstate Commerce Commission over the street railways operating in the District of Columbia.]

AN ACT Authorizing certain extensions to be made of the lines of the Anacostia and Potomac River Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and the Capital Traction Company, in the District of Columbia, and for other purposes.

* * * * *

SEC. 16. That every street railroad company or corporation owning, controlling, leasing or operating one or more street railroads within the District of Columbia shall on each and all of its railroads supply and operate a sufficient number of cars, clean, sanitary, in good repair, with proper and safe power, equipment, appliances and service, comfortable and convenient, and so operate the same as to give expeditious passage, not to exceed fifteen miles per hour within the city limits or twenty miles per hour in the suburbs, to all persons desirous of the use of said cars, without crowding said cars. The Interstate Commerce Commission is hereby given power to require and compel obedience to all of the provisions of this section, and to make, alter, amend and enforce all needful rules and regulations to secure said obedience; and said Commission is given power to make all such orders and regulations necessary to the exercise of the powers herein granted to it as may be reasonable and proper; and such railroad companies or corporations, their officers and employees, are hereby required to obey all the provisions of this section, and such regulations and orders as may be made by said Commission. Any such company or corporation, or its officers or employees, violating any provision of this section, or any of the said orders or regulations made by said Commission, or permitting such violation, shall be punished by a fine of not more than one thousand dollars. And each day of failure or neglect on the part of such company or corporation, its officers or employees, to obey each and all of the provisions and requirements of this section, or the orders and regulations of the Commission made thereunder, shall be regarded as a separate offense.

SEC. 17. That prosecutions for violations of any of the provisions of this Act shall be on information of the Interstate Commerce Commission filed in the police court by or on behalf of the Commission.

Public No. 134, approved May 23, 1908.

EXCERPTS FROM ADMINISTRATIVE RULINGS AND OPINIONS ¹

[For list of subjects covered by administrative rulings, see section 66, *ante*; only such excerpts are here inserted as have a bearing on the jurisdiction of the Commission, or relate to procedure before it.]

* * * * *

56. *Reduction of joint rate or fare to equal sum of locals.*—* * *

Many informal complaints are received in connection with regularly established through rates or fares which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate or fare except after full hearing upon formal complaint. It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider the through rate or fare which is higher than the sum of the locals between the same points as *prima facie* unreasonable and that the burden of proof would be upon the carrier to defend such higher through rate or fare.

* * * * *

70. *Routing and misrouting freight* (issued March 18, 1907).—Alleged neglects or errors on part of agents of carriers in misrouting shipments lead to numerous claims of overcharge, many of which are meritorious. The lawful charge on any shipment is the tariff rate via the route over which the shipment moves. No carrier can lawfully refund any part of the lawful charge except under authority so to do from the Commission or from a court of competent jurisdiction. That thorough understanding and uniform practice may be had in this connection, the Commission issues the following administrative ruling:

In order to secure desired delivery to industries, plants, or warehouses and avoid unnecessary terminal or switching charges, the shipper may direct as to terminal routing or delivery of shipments which are to go beyond the lines of the initial carrier; and his instructions as to such terminal delivery must be observed in routing and billing such shipments. The carriers may not disregard the instructions of shippers as to intermediate routing, except when tariff of initial line reserves the right to carrier to dictate intermediate routing. When such reservation is made in tariff, (1) where all-rail rates and rail-and-water rates are available the agent of carrier must have the shipper designate which of the two he wishes to use; and (2) the agent must not route shipment via a route that will be more expensive to the shipper than the one desired by him, or that does not furnish substantially as good and expeditious service. If carrier is not willing to observe the intermediate routing instructions of shipper it must not execute bill of lading containing such routing. Carriers will be held responsible for routing shown in bill of lading.

¹ See section 55.

In the absence of specific through routing by shipper, which carrier is willing to observe, it is the duty of the agent of the carrier to route shipment via the cheapest reasonable route known to him of the class designated by the shipper—that is, all-rail or rail-and-water—and via which he has rates which he can lawfully use. If a foreign car is available which under rules as to car service must be sent via a particular line or route over which a higher rate obtains, agent must explain to shipper that fact and allow shipper to elect whether he will use that car at the higher rate or wait for another car. If shipper elects to use the car at the higher rate, agent should so note on bill of lading. If agent is in doubt, he should secure information from proper officers of traffic department. It is important that agents at initial points be able to, and that they do, quote correct rates and give correct routings.

If a carrier's agent misroutes a shipment and thus causes extra expense to the shipper over and above the lawful charges via another available route of the class designated by shipper—that is, all-rail or rail-and-water—over which such agent had applicable rates which he could lawfully use, and responsibility for agent's error is admitted by the carrier, such carrier may, as to shipments moving subsequent to March 18, 1907, adjust the overcharge so caused by refunding to shipper the difference between the lawful charges via the route over which shipment moves and what would have been the lawful charges on same shipment at the same time via the cheaper available route of the class designated which could have been lawfully used. Such refund must in no case exceed the actual difference between the lawful charges via the different routes as specified, and must in every instance be paid in full by the carrier whose agent caused such overcharge and must not be shared in by or divided with any other carrier, corporation, firm, or person. This authority is limited strictly to the cases specified and to the circumstances recited and does not extend or apply to instances in which soliciting or commercial agents of carriers induce shippers to route shipments over a particular line via which a higher rate obtains than is effective via some other line.

The rule is intended to apply to cases in which the agents who bill or actually forward or divert shipments through error or oversight send the shipments via routes that are more expensive than those directed by shippers or available in the absence of routing instructions by shippers. It must not be used in any case or in any way to "meet" or "protect" a rate via another route or gateway via which the adjusting carrier has not in its tariffs at the time the shipment moves rates which are available and lawfully applicable thereto, nor as a means or device by which to evade tariff rates or to meet the rate of a competing line or route, nor to relieve shipper from responsibility for his own routing instructions.

(Issued November 15, 1907.) The prerequisites to any refund under this rule are admission by carrier of responsibility for its agent's error in misrouting the shipment, and such carrier's willingness to bear the extra expense so caused, without recourse upon any other carrier for any part thereof. If, therefore, the error is discovered before the shipment has been delivered to consignee or before charges demanded upon same have been paid, the carrier acknowledging responsibility for the error may authorize the delivering carrier

to deliver shipment upon payment of the charges that would have applied but for the misrouting and to bill upon it for the extra charge; or, if the shipment has been delivered undercharged before the error is discovered, the carrier that acknowledges responsibility for the error may pay the undercharge to the carrier that delivered the shipment instead of requiring it to collect the undercharge from shipper, to be refunded to shipper.

Complete distinction must be observed between cases to which this rule applies and those provided for under Rule 74.

Shippers must bear in mind that there is a limit beyond which an agent of a carrier could not reasonably be expected to know as to terminal delivery or local rates at distant points and on lines of distant roads to or with which he has no specific joint through rates. Consignors and consignees should cooperate with agents of carriers in avoiding misunderstandings and errors in routing and must expect to bear some responsibility in connection therewith.

* * * * *

74. *Return of astray shipments* (issued May 6, 1907).—Instances occur in which, through error or oversight on the part of some agent or employee, a shipment is billed to an erroneous destination or is unloaded short of destination or is carried by. The Commission is of the opinion that in bona fide instances of this kind carriers may return such astray shipments to their proper destination or course without the assessment of additional charges, and may arrange for such movement of such astray shipments for each other on mutually acceptable terms without the necessity of publishing, posting, and filing tariff under which it will be done.

Complete distinction must be observed between cases to which this rule applies and those provided for under Rule 70.

* * * * *

81. *Special reparation on informal complaints*¹ (issued June 7, 1907).—To assist in the settlement of certain claims of shippers against carriers, and as a practical means of disposing with promptness of informal complaints that might otherwise develop into formal complaints, and in connection with which the unreasonableness of the rate or regulation is admitted by the interested carrier or carriers, the Commission on full information will authorize adjustment by special order if all of the facts and conditions warrant such action. The connections in which the Commission has authority to modify the provisions of the law are specified in the Act. The Commission will not assume to modify it in any other connections or features.

The instances in which the Commission will authorize refund or reparation on informal complaint and in an informal way will be confined to those in which the informal showing develops plainly a case in which the Commission would award reparation on formal hearing and in which an adjustment agreeable to complainant and carrier or carriers and in conformity with the provisions of the law is reached.

Reparation involving refund of alleged overcharges in instances in which the lawful tariff rates have been applied will be authorized under informal proceedings, only when the carrier admits the unrea-

¹ For form prescribed for special reparation cases see Form No 11a.

sonableness of the rate charged and it is shown that within a reasonable time, not exceeding six months, after the shipment moved it has incorporated in its own tariffs, or in tariffs in which it has concurred, the rate upon basis of which adjustment is sought, and has thus made that rate lawfully applicable via the route over which shipment in question moved. Adjustment of a claim of this character that is filed with the Commission within six months after the shipment moved may, however, be authorized even if more than six months have elapsed between the movement of the shipment and the effective date of tariff rate or regulation that forms the basis of such adjustment. Authority for refund on account of a reduced rate or changed tariff regulation will also contain Commission's order requiring the maintenance of such rate or regulation for at least one year.

No carrier may pay any refund from its published tariff charges save with the specific authority of the Commission in accordance with the provisions of the Act. When an informal or formal reparation order has been made by the Commission the principle upon which it is based shall be extended to all like shipments, but no refunds shall be made upon such like shipments except upon specific authority from the Commission therefor.

The shipper should pay the lawfully published charges applicable via the route over which the shipment moves, and make claim for refund if he believes he has been overcharged. The Commission will not ordinarily include in reparation award demurrage charges which accrue pending adjustment or subsequent to consignee's refusal to accept the shipment and pay the lawful charges thereon, but in special cases such demurrage charges may be included in the amount of refund.

It is the duty of the delivering carrier to collect, and of the consignee to pay, demurrage charges as per lawful tariffs. Demurrage charges accruing because of error of a carrier are considered in the same light as are other additional transportation charges caused by carrier's error; and if adjusted, the full expense thereof must be borne by the carrier whose agent is responsible for the error. (See Rule 70.)

The Commission has repeatedly announced the view that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The lawful rate or fare for through movement is the through rate or fare, wherever such through rate or fare exists, even though some combination makes a lower rate or fare and even though the practice in the past has been to give to some the benefit of such lower combination. The Commission long since extended to carriers, in a general order, permission to reduce, on one day's notice, a joint commodity or class rate or fare that is higher than the sum of the locals between the same points to make it equal the sum of such locals. If, therefore, carriers have maintained through rates or fares that are higher than the sums of the locals between the same points, it is because of their desire so to do, and not, as some agents of carriers have informed shippers, because the law or the Commission forces them to do so. (See Rule 56.)

If a carrier desires to give its patrons the benefit of the same rate

or fare that applies via another line or gateway, and which is lower than its own rate or fare, it can do so by lawfully incorporating that rate or fare in its own tariffs, and so give the benefit of it to all of its patrons alike. The law forbids giving such lower rate or fare to one and withholding it from another, but neither the law nor the Commission stands in the way of adoption in lawful manner of the lower rate or fare as available for all.

The Commission's power to authorize adjustments will not be exercised in such way as to create the very discriminations which the law aims to prevent. No doubt instances will occur in which seeming hardship will come to some. Much of such embarrassment will be avoided if agents of carriers and shippers take pains to be certain that correct rates are quoted and correct routing is given.

Claims filed since August 28, 1907, must have accrued within two years immediately prior to the date upon which they are filed; otherwise they are barred by the statute. Claims filed with the Commission on or before August 28, 1907, are not affected by the two years limitation in the act. The Commission will not take jurisdiction of or recognize its jurisdiction over any claim for reparation or damages which is barred by the statute of limitation, as herein interpreted, and the Commission will not recognize the right of a carrier to waive the limitation provisions of the statute.

* * * * *

86. *Ocean carriers—export and import tariffs.*—Ocean carriers between ports of the United States and foreign countries *not adjacent* are not subject to the terms of the act to regulate commerce; nor to the jurisdiction of the Commission.

The inland carriers of traffic exported to or imported from a foreign country not adjacent, must publish their rates and fares to the ports and from the ports, and such rates or fares must be the same for all regardless of what ocean carrier may be designated by the shipper or passenger.

As a matter of convenience to the public they may publish in their tariffs such through export or import rates or fares to or from foreign points as they may make in connection with ocean carriers. Such tariffs must, however, distinctly state the inland rate or fare as above provided; and need not be concurred in by the ocean carrier, because, concurrence can be required from, and is effective against, only carriers subject to the act.

Whichever plan of publishing these rates and fares is followed the tariffs must be filed and posted, and may be changed only upon statutory notice or under special permission for shorter time.

Export and import traffic may be forwarded under through billing but such through billing must clearly separate the liability of the inland carrier or carriers and of the ocean carrier, and must show the tariff rate of the inland carrier or carriers.

* * * * *

Boats that are not common carriers. (Issued April 14, 1908.—Certain carriers have been in the habit of advancing the charges of sailing vessels, boats and barges bringing vegetables to their terminals to be forwarded to interstate destinations, and of entering the amount on way bills as charges in addition to their tariff rates. Upon inquiry

whether the carriers may lawfully continue this practice it was held that if the boats are common carriers, making regular trips and offering their services to the general public, they must file tariffs and the practice must be discontinued until they do so.

* * * * *

Joint rates between a water and a rail carrier subjects the former to the provisions of the act. (Issued May 4, 1908.—A steamboat line agreed upon joint rates with a rail line for certain passenger and freight traffic. *Held*, That it could not unite with a railroad company in making a through route and joint rate on a particular traffic without subjecting all its interstate traffic to the provisions of the law and to the jurisdiction of the Commission.

FORMS FOR USE BEFORE THE COMMISSION

[These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary. Those followed by an asterisk (*) are recommended by the Commission; the other forms are from cases, and are in more detail than the forms recommended for use by the Commission.]

No. 1. Complaint against a single carrier.*

No. 1a. Complaint, State railroad commission and shippers complainants.

No. 2. Complaint against two or more carriers.*

No. 2a. Petition by voluntary association against two carriers.

No. 2b. Alleging violation of section 4 of the act.

No. 2c. Seeking obedience to section 6.

No. 2d. Prayer for compliance with section 6.

No. 2e. By a common carrier seeking the establishment of a through route and joint rates with another.

No. 2f. Prayer for through routes and joint rates.

No. 3. Answer.*

No. 3a. Another form of answer.

No. 3b. Another form of answer.

No. 3c. Another form of answer.

No. 4. Notice by carrier under Rule V (notice in nature of demurrer).*

No. 5. Subpœna.*

No. 6. Notice of taking depositions under Rule XII.*

No. 7. Motion for allowance of time to file petition of intervention.

No. 8. Motion for leave to intervene.

No. 8a. Intervening petition.

No. 9. Form of prayers.

No. 10. Another form of prayers.

No. 11. Allegation in petition setting up defense of carrier.

No. 11a. Form prescribed for special reparation cases.

No. 1.—*Complaint against a single carrier*

INTERSTATE COMMERCE COMMISSION

	A. B.	}
	<i>against</i>	
THE RAILROAD	
	Company.	

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of and points in the State of, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That (*here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III*).

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such other and further order as the Commission may deem necessary in the premises. (*The prayer may be varied so as to ask also for the ascertainment of lawful rates or practices and an order requiring the carrier to conform thereto. If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*)

Dated at,, 190...

A. B.

(*Complainant's signature.*)

No. 1a.—*State Railroad commission and shippers complainants*

(CAPTION.)

To the Interstate Commerce Commission:

The petition of the above-named complainants respectfully shows:

I

(a) That the complainants, A B, C D, and E F, are the duly appointed and qualified Commissioners of the Railroad Commission of

the State of; that said Commission was duly created and organized and now exists under the laws of the State of; that said Commissioners are authorized by said laws to complain to the Interstate Commerce Commission of matters which they think constitute a violation of the act to regulate commerce; and that said Commissioners join in this complaint on behalf of the people of the State of

(b) That complainant, the Z..... Coal Company, is a corporation organized under the laws of the State of; that it has an office at in the State of; that it is engaged in mining, shipping, and selling coal; that it mines coal at the shipping points of and, all in the State of, and ships it from said points to and other places in the State of over the lines of railway of the above-named defendants, the K..... & L..... Railroad Company and the P..... & Q..... Railway Company.

(c) *(Describe additional complainants in the same manner.)*

II

That each of the above-named defendants, the K..... & L..... Railroad Company and the P..... & Q..... Railway Company, is a common carrier engaged in the transportation of property by railroad, between points in the different States of the United States, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III

(a) That the defendants, the K..... & L..... Railroad Company, now exact for the transportation of coal in car lots to in the State of from in the State of 70 cents per ton; but the said railroads had established and filed with the Interstate Commerce Commission schedules of rates wherein and whereby it is provided that said rate on said commodity shall be increased to the extent of cents per ton on and after May 1, 190...

(b) *(Describe advances in rates by the other carriers.)*

IV

That each of the increases in rates above-mentioned is, and each of the increased rates which result therefrom when made effective as aforesaid will be, excessive, unreasonable, and unjust, and in violation of the provisions of the act to regulate commerce, particularly section 1 thereof.

V

That the complainant coal dealers herein named have sold, and are under contract to deliver, coal in the State of from time to time between now and April 15, 190.., at fixed prices, which include the charges for transporting the coal to said destination points from the shipping points hereinbefore mentioned; that said contracts by their terms are to remain in force until the said April 15; that the profit derived in each instance by such complainants upon the coal to which said contracts relate at the rates of transportation now in force, as aforesaid, is less, and, in some instances, much less, than the said advance of cents per ton; that said contracts were entered into by such complainants only after they had conferred with the defendants named in this complaint, and had been assured by the latter that the transportation charges on coal to in the State of from said shipping points above-named, would not be changed previous to said April 15.

VI

That the complainant coal dealers named herein are under contracts with their employees, and thereby obligated, to pay to such employees a fixed schedule of wages for services in connection with the mining and preparation of said coal; that when said schedules were agreed upon and entered into by and between such complainants and their employees, the rates of transportation on coal to andabove mentioned were the same as those now in force, and such rates and their relation to other rates exacted for the transportation of coal to and from territories of production other than those hereinbefore specified but which are hereinafter referred to, form the basis for determining in each instance wages to be paid by such complainants and their said employees.

VII

That the complainant coal dealers herein named compete in and (destinations) with other coal dealers to ship coal to said points from coal mines located in the States of and, and that the coal of said complainants is much inferior in quality to that handled and sold by said other coal dealers.

VIII

That the rates exacted at the present time by defendants, as aforesaid, for transporting coal in carloads to and from the shipping points first hereinbefore named have been continuously

maintained in force by said defendants during several years last passed; that said rates are, and each of them is, just and equitable and satisfactory to all parties interested therein, with the possible exception of said defendants, and were established and put in force as aforesaid by said defendants as a result of proper consideration of all the elements which should and did affect them at the time they were so put in force, including the elements hereinbefore mentioned and described; that each of said elements and the circumstances and conditions pertaining to the transportation of coal to from the shipping points first hereinbefore named are the same now that they were when the rates put in force, as above stated, were established and made effective, except that the density of traffic on the lines of railway of the defendants and the gross and net earnings of said defendants are much greater now than they were then.

IX

That the increase in rates provided for by said defendants in the schedules filed with the Interstate Commerce Commission, as aforesaid, were established by concert of action and unlawful agreement by and among all the defendants named in this complaint, wholly in their own interests and regardless of the interests of the complainant coal dealers named herein and also without reference to the interests of the general public.

X

That if the said increases in rates are made effective, as provided for by said defendants in the schedules of rates filed with the Interstate Commerce Commission, as aforesaid, the increased rates thus made will bring about results, as follows: That the complainants who have sold and are under contract to deliver coal in and, as above described, will suffer losses instead of deriving profits from said contract; the complainant dealers named herein will be unable to compete successfully in and with said other coal dealers; the amount of coal said complainant will be able to mine, ship, and sell will thereby be diminished in quantity; the employment said complainants will be able to furnish to their employees will be less than it is at present; the equitable adjustment now existing between said complainants' mines and employees, on the one hand, and the mines and employees of such coal dealers, on the other hand, will become disrupted, which will cause much demoralization, and the consumers located at and will be deprived of competition they now enjoy and compelled to pay higher prices than they are now paying for coal; and irreparable injury will thus result to said

complainant coal dealers, to the employees of such complainants, to other people located at said shipping points, to the consumers of coal located in and, and to the general public.

Wherefore, complainants pray that the defendants be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants to refrain from putting or maintaining in force the increased rates on coal named in schedules filed with the Interstate Commerce Commission, as aforesaid, and to charge as maxima in future for the transportation of coal, in carloads, to and from said shipping points, as herein named, such rates of transportation as the Commission may deem reasonable and just; and that such other and further order, or orders, be made as the Commission may consider proper in the premises and complainants' cause may appear to require.

Dated at this day of, 190...

.....
(Signature of Complainant)

.....
(Address)

.....
(Counsel)

.....
(Address.)

No. 2.—*Complaint against two or more carriers*

INTERSTATE COMMERCE COMMISSION

	A. B.	}
	<i>against</i>	
THE RAILROAD Company,	
	and	
THE RAILROAD Company,	

The petition of the above-named complainant respectfully shows:

I. That (*here let complainant state his occupation and place of business*).

II. That the defendants above named are common carriers engaged in the transportation of passengers and property by continuous carriage or shipment, wholly by railroad (*or partly by railroad and partly by water, as the case may be*), between points in the State of and points in the State of, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

(*Then proceed as in Form 1.*)

No. 2a.—*Petition of voluntary association*¹

(CAPTION)

Address:

I

The complainant is a voluntary association whose members are engaged in mining, shipping, and selling coal, there mines being located in the States of at different points on the lines of railway of the F..... & G..... Railroad Company and the H..... & I..... Railway Company, defendants herein. That one of the purposes for which complainant was organized and now exists is to procure for the benefit of its members reasonable, just, and nondiscriminating rates of transportation on coal from shipping points in the State of aforesaid to points of consumption in the States of and, and other States and Territories of the United States, and also the markets of consumption in the Republic of Mexico. That the principal office of the complainant is at, in the State of, and that complainant institutes this proceeding on behalf of its members and also in the interest of the general public located at and in the vicinity of the shipping and consuming points, as aforesaid.

II

That each and all of the above-mentioned defendants is a common carrier engaged in the transportation of property by railroad between points in the different States of the United States, and particularly from shipping points in the States of and aforesaid to points of consumption and ports of transshipment in the States of and, and as such common carriers, are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III

That the defendants, the F..... & G..... Railroad Company and the H..... & I..... Railway Company, exact for the transportation of lump coal and slack coal, in carloads, as follows:

From Tifton and Ada, in the State of, and from Arthur, in the State of

To—	Average distance	Rate per ton of 2,000 pounds
Smithville	167	\$1.40
Jonesville	183	1.55
Adamtown	208	1.65
etc.	etc.	etc.

¹ Adapted from petition in *Oklahoma & Arkansas Coal Traffic Bureau v. C. R. I. & P. R. Co.* (I. C. C. Docket No. 1097).

That each of said rates is excessive, unreasonable, and unjust, and in violation of the provisions of the act to regulate commerce, particularly section 1 thereof, and that reasonable and just rates for such transportation from said shipping points would not exceed the following:

To—	Rate per ton of 2,000 pounds
Smithville	\$1.10
Jonesville	1.25
Adamtown	1.40
etc.	etc.

IV

(Repeat similar allegations for other routes and other commodities, if it be desired to raise the question.)

V

That all the rates hereinbefore mentioned as exacted for the transportation of coal, in carloads, over defendants' line of railway from said shipping point in the States of and to said consuming or destination points in the State of and were established and are now maintained in force and exacted, as aforesaid, by mutual agreement and concert of action by and among all carriers named as defendants in this proceeding.

VI

That complainant's members are now engaged in selling coal at said consuming or destination points and ship same thereto from their respective mines in the States of and over defendants' lines of railway, as aforesaid, and wish to increase said business, but are prevented from doing so by the excessive and unreasonable rates of transportation hereinbefore set forth and by the discriminations hereinafter described.

VII

That the defendant, the P..... & Q..... Company, dictates the policy of the R..... & S..... Railway Company and the T..... & U..... Railroad Company; that, pursuant to such dictation, the last two named defendants participate in joint rates of transportation on coal, in carloads, from shipping points in the State of to the consuming or destination points in the State of, hereinbefore mentioned, which are much less per ton per mile than the rates per ton per mile contemporaneously exacted by them in connection

with other defendants herein named, for the transportation of coal, in carloads, from the shipping points in the States of and (as mentioned in Paragraph IV hereof) to the destination or consuming points; that in selling their coal at said destination points, complainant's members are obliged to compete, and do compete, with other dealers to make shipments of coal thereto from such shipping points in the State of, and that such shipping points are as follows: Johns, Aldens, etc.

VIII

(Similar allegations may be made for other defendants, if it be desired to compare the relation as between different points of origin and the same points of destination.)

IX

That the cost of producing the coal shipped by complainant's members, as aforesaid, is much greater than the cost of producing the coal shipped from points in the State of at the mines mentioned in Paragraph VII, and also much greater than the cost of producing the coal shipped from the points in the State of, as set forth in Paragraph VIII hereof; that the average distance of the consuming points or destination from the shipping points referred to in Paragraph IV hereof is much less than the average distance to the same consuming or destination points from the shipping points referred to in Paragraphs VII and VIII hereof; but that this difference in distance in favor of coal shipped by complainant's members is more than offset by the discriminations in rates and differences in cost of production above set forth, and that, as a consequence, complainant's members are unable to compete successfully at said consuming or destination points in the State of with other dealers to make shipments of coal thereto from the shipping points mentioned in Paragraphs VII and VIII, and complainant's members are deprived of the benefits they would receive from the natural advantage possessed by them, that is to say, the advantage of owning coal mines which are located nearer to said destination points than are the coal mines of their said competitors.

X

That the discrimination in rates hereinabove described are made by mutual agreement and concert of action by and among all the carriers named as defendants in this proceeding.

XI

That as a direct consequence of the excessive rates exacted and discriminations practiced by defendants, as above set forth, the tonnage on coal produced in the States of and has decreased in recent years, while during the same time the tonnage of coal produced in the States of and has materially increased.

XII

That by reason of the premises, the defendants are, and each of them is, subjecting complainant's members to the payment of unreasonable and unjust rates of transportation and subjecting the complainant's members and their traffic and the general public located at and in the vicinity of the said shipping points in the States of and, and said consuming or destination points in the States of and to undue and unreasonable prejudice and disadvantage, and giving to said other coal dealers and their traffic and members of the general public located at and in the vicinity of the aforesaid shipping points mentioned in Paragraphs VII and VIII undue and unreasonable preference and advantage, in violation of the provisions of said act to regulate commerce, particularly sections 1 and 3 thereof.

Wherefore, Complainant prays that the defendants may be severally required to answer the charges herein; that, after due hearing and investigation, an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of the said Act to regulate commerce, and apply as maxima in the future to the transportation of coal, in carloads, from said shipping points in the States of and to said consuming or destination points in the States of and such rates of transportation as the Commission may deem reasonable and just, and that such other and further order, or orders, may be made as the Commission may consider proper in the premises and the complainant's cause may appear to require.

Dated at,;, 190...

UNION COAL ASSOCIATION,

By, *Traffic Manager.*

(Address)

.....

(Counsel)

.....

(Address)

No 2b.—*Alleging violation of section 4 of the act*^a

That while defendants exact from complainants cents per hundred pounds for the transportation of from A....., in the State of, to the following named points in the State of, defendants exact from parties other than complainants for the transportation of from B....., State of, to the same points in the State of, when shipped by such other parties, only cents per hundred pounds. That the route over which the said commodity goes is exactly the same in each instance when the initial point of shipment is B....., except that when the initial point is B....., the shipments are handled through A....., and are handled by defendants over a greater distance than when the initial point is A..... That in each instance the transportation services pertaining to said shipments, regardless of whether the traffic originated at A..... or B....., are performed by defendants under substantially similar circumstances and conditions. And that, by reason of the premises, defendants exact from complainants a greater compensation in the aggregate for the transportation of over the shorter distance from A..... than defendants contemporaneously exact from parties other than the complainants for the transportation of like traffic over the greater distance from B....., to said points in the State of, the shorter haul being included in the longer haul, and the transportation being over the same line and in the same direction; and that defendants thereby violate the provisions of the act to regulate commerce, as amended, particularly section 4 thereof.

No. 2c.—*Seeking obedience to section 6*

That prior to the day of, no tariffs for public inspection were kept by the said defendant in its offices at or, but that the complainant states on information and belief that the tariffs filed with the Interstate Commerce Commission during said period showed a uniform rate of cents per hundred pounds on of all kinds between, in the State of and, in the State of; that said failure to post tariffs or schedules in accordance with section 6 of the act to regulate commerce and the rules prescribed by the Interstate Commerce Commission constitute a violation of said act.

^a Adapted from *Randolph Lumber Company v. S. A. L. R. Co.* (I. C. C. Docket No. 1056).

No. 2d.—*Prayer for compliance with section 6*

That the said Commission determine and prescribe what regulation or practice in respect to the publication of rates is just, fair and reasonable, and that it make an order requiring said defendant to desist from said unlawful practices and require it to thereafter publish and post at its stations, in accordance with the law and the rules of the Commission, its schedules or tariffs.

No. 2e.—*By a common carrier seeking the establishment of a through route and joint rates with another*

That the complainant carrier has a physical connection with the rails of the defendant carrier (or that same can be easily made at a small cost), and that the complainant has at numerous times requested said defendant to join it in establishing through routes and joint rates covering shipments from points upon the line of the defendant outside of the city of to points upon the railroad of the complainant, and from points upon the railroad of the complainant to points upon the railroad of the defendant, situated outside of the city of, and it has been at all times, and now is, willing to join with said defendant in establishing through routes and joint rates to cover shipments of all classes of freight and merchandise from points upon its railroad to points on the railroad of the said defendant carrier, outside of the city of, and to points upon said railroad of the defendant outside of the city of to points upon the railroad of complainant, and that the defendant has refused and now refuses, to join the complainant in establishing through routes and joint rates, as above set forth, but said defendant has in all cases required the payment by the owners of the property shipped upon its lines of the full local rates to and from the point of destination upon its railroad.

No. 2f.—*Prayer for through routes and joint rates*

That the Commission establish through routes and joint rates covering the shipment of such articles of merchandise as, on investigation, is shown to be the subject of transportation from points along the complainant's railroad to points on the line of the defendant's railroads, outside the city of, and from points on the line of the defendant's railroad outside the city of to points upon the line of the complainant's railroad, over the railroads of complainant and defendant; the said joint rate so established to be the maximum to be

charged, and that the Commission also prescribe a division of such rate, or rates, and the terms and conditions upon which such through route shall be operated.

No. 3.—*Answer.*

INTERSTATE COMMERCE COMMISSION

A. B.
against
 THE RAILROAD COMPANY. }

The above-named defendant, for answer to the complaint in this proceeding, respectfully states—

I. That (*here follow the usual admissions, denials, and averments. Continue numbering each succeeding paragraph*).

Wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE RAILROAD COMPANY,
 By E. F.
 (Title of officer)

No. 3a.—*Another form of answer*

(CAPTION)

SEPARATE ANSWER OF THE F..... & G..... RAILROAD COMPANY

Now comes the F..... & G..... Railroad Company, and, for its separate answer to the complaint in the above-entitled proceeding, denies each and every allegation in complainant's petition contained, and, having fully answered, asks that it be hence dismissed, with costs in this behalf incurred.

A..... B.....,
Attorney for F..... & G..... Railroad Co.,

 (Address)

No. 3b.—*Another form of answer*

(CAPTION)

SEPARATE ANSWER OF THE H..... & I..... RAILWAY COMPANY

Comes now the H..... & I..... Railway Company, one of the

corporations defendant in this proceeding, and admits that it is a common carrier, as stated in the complaint, but denies that the rates complained of against it are excessive, unreasonable, or unjust, or in violation of any of the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

Wherefore, This defendant asks that the complaint in this proceeding be dismissed.

H. & I. RAILWAY COMPANY,
By E. W., *General Solicitor*,
.....
(Address)

No. 3c.—*Another form of answer.*

(CAPTION)

SEPARATE ANSWER OF THE & RAILROAD COMPANY

Now comes the & Railroad Company, one of the defendants in the above-entitled cause, and answering the complaint filed against it in said cause, says:

I

It denies that the existing rates are unreasonable or in violation of said act to regulate commerce, or that said rates are in excess of the value of the services rendered by the carriers in the movement and transportation of coal.

II

Defendant denies also that the rates proposed by complainant are reasonable, and says that, as a matter of fact, said rates are unreasonable, and would not pay anything like the expenses of transporting the coal.

III

This defendant says that while it participated in said coal rates to the points upon its line mentioned in complainant's petition, none of the territory covered by said petition is contiguous to this defendant's line of railroad. That it is engaged in the transportation of coal largely from points in the State of, and that the prevailing rates on coal are adjusted with reference to the rates from points in the States of and, and that the existing adjustment of said rates should not, in any wise, be disturbed.

IV

This defendant says that it is not in a financial condition to stand any reduction in rates. That, in view of the increased cost of operation, resulting from many causes, and in view of the fact that rates on coal are already lower than on almost any other commodity transported, it avers that the existing rates are reasonably low, and that to further reduce them would result in a confiscation of defendant's property without due process of law, in violation of the Constitution and laws of the United States.

Wherefore, This defendant prays that said complaint be dismissed.

G..... H.....,

Attorney for & Railroad Co.,

.....

(Address)

No. 4.—*Notice by carrier under Rule V*³

INTERSTATE COMMERCE COMMISSION

A. B.

against

THE RAILROAD COMPANY.

}

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE RAILROAD COMPANY,

By E. F.

(*Title of officer.*)

No. 5.—*Subpoena*⁴

To ,

.....

You are hereby required to appear before in the matter of a complaint of against , as a witness on the part of on the day of , 190.., at o'clock ... m. at , and bring with you then and there

Dated

(Seal.)

..... ,

Commissioner.

..... ,

..... ,

Attorney for

³ See Rules of Practice, *post*. This notice serves the purpose of a demurrer.

⁴ Printed subpoenas are furnished by the Commission.

(NOTICE.—Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.)

No. 6.—*Notice of taking depositions under Rule XII*

INTERSTATE COMMERCE COMMISSION

A. B.
against
 THE RAILROAD COMPANY. }

You are hereby notified that G. H. will be examined before C. D., a (*title of officer or magistrate*), at, on the day of, 190.., at o'clock in thenoon, as a witness for the above-named complainant (*or defendant, as the case may be*), according to act of Congress in such case made and provided, and the Rules of Practice of the Interstate Commerce Commission, at which time and place you are notified to be present and take part in the examination of the said witness.

Dated , 190...

I. J.

(*Signature of complainant or defendant, or of counsel.*)

To A. B., the above-named complainant (*or The Railroad Company, the above-named defendant; or to K. L., counsel for the above-named complainant or defendant.*)

No. 7.—*Motion for allowance of time to file petition of intervention*

(CAPTION)

Address:

Now comes the Chamber of Commerce of, a trade and commerce organization of the city of, by its attorneys, and, and move the Commission for an allowance of thirty days within which to file an intervening petition in the above-entitled cause, and in support of said motion, alleges that it has not had sufficient time within which to file an intervening petition in the above-entitled cause, and in support of said motion, alleges that the city of is vitally interested in the issues raised and made by the pleadings in this proceeding, and it further alleges that it has not had suf-

ficient time within which to properly prepare its petition of intervention, setting forth the facts and the grounds upon which they wish to ask the leave of the Commission to be made parties in this proceeding.

.....
 (Signature of Petitioner)

 (Address)

 (Counsel)

 (Address)

No. 8.—*Motion for leave to intervene*^{*}

(CAPTION)

Address:

Comes now of, in the State of and asks leave to intervene in the above entitled proceeding and for cause states that he is engaged in handling merchandise at, in the State of and is interested as a shipper in the matters and things stated in the petition, and will be affected by the decision to be rendered.

.....
 (Signature of Petitioner)

 (Address)

 (Counsel)

 (Address)

No. 8a.—*Intervening petition*

(CAPTION)

Address:

The petition of of in the State of, respectfully shows:

1

That he is a merchant dealing in at in the State of (or if an association, set out the organization, as if filing an original petition).

^{*} *Blakenship v. B. S. & C. R. Co. (I. C. C. Docket 1777).*

II

That heretofore, to wit, on the day of, 19.., the petitioner was, by order, permitted to intervene in the above entitled proceeding.⁶

III

That the petitioner is engaged in the manufacture and sale of the same commodities, the original petitioner herein, and at the same place (or competing place, as the case may be) and will be affected in his business by the change in rates as sought by the original petition (or change in practice).

IV

(Such other facts as may be germane to the inquiry, as would be appropriate in an original petition.)

V

(The petitioner may state that he wishes to join in asking a change in rates or practices or may state that the present arrangement is satisfactory to him and reasonable and just and nondiscriminatory).⁷

(Usual prayers, as in original petition, if leave to intervene has been granted; if not, a prayer for leave to intervene should be used in addition).

.....
(Signature of Petitioner)

.....
(Address)

.....
(Couns 1)

.....
(Address)

No. 9.—*Form of prayers*⁸

Wherefore, premises considered, the complainant says that the violation of the act to regulate commerce, in that said rates are unjust and unreasonable because the same are too high as alleged, and result in an unjust and unreasonable exaction from the complainant, and injure the complainant in its business in that the said rates prohibit to a large extent the growth of the complainant's business, the complain-

⁶ See preceding form.

⁷ See section 103.

⁸ See section 80.

ant prays that service of this petition be had upon the defendant carriers; that the defendants be required to answer this complaint; and that the Commission set the same down for hearing at as early a date thereafter as is deemed practicable; and that after the hearing of said complaint and all of the matters of fact pertaining thereto, that the Commission make its order that the carriers cease and desist from further demanding, charging or collecting said unlawful rates of freight; and that the Commission prescribe the maximum rates of freight which the defendants respectively, either jointly or severally, shall thereafter demand, charge and collect, upon the shipments of the said commodities from Grand Rapids, Mich., to the points aforesaid; and that the complainant be allowed its damages in the premises; and that the Commission find the amount of the damage which has accrued to the complainant as aforesaid; and that it make an order directing the carriers liable therefor to pay the same to the complainant as provided by law; and further, that the Commission take such proceedings and make such orders in the premises as the complainant may show itself entitled to.

In duty bound will ever pray.*

A. C. P. Co., S. A. W., *Vice-President,*
Address.

C., B. & G.

S. H. C.,

Attorneys for Complainant,
Ft. Worth, Tex.

No. 10.—*Another form of prayers*¹⁰

Wherefore, the premises considered, the complainants pray that the defendants above named may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding the said defendants and each of them to cease and desist from the aforesaid violations of the said act to regulate commerce and to establish and put in force and apply as maxima in future to the transportation of crude limestone, ground limestone, and lime between Martinsburg, in the State of West Virginia, and the destination points referred to in paragraphs III and V hereof, in lieu of the class rates named in paragraphs IV—*b* and V hereof, such rates as the said defendants file and publish applying from Bunker Hill, in the said State of West Virginia, to the destinations aforesaid,

*From *Acme Cement Plaster Co. v. L. S. & M. S. R. Co.* (I. C. C. Docket No. 1434).

¹⁰ See section 80.

and that such other and further order or orders may be made as the Commission may consider proper and the premises and complainants' cause may appear to require.¹¹

Dated at Baltimore, Md., July 9, 1908.

THE S. L. AND S. C.,
By D. B., *President*.
THE W. B. L. C.,
By G. H., *President*.

J. B. C.
F. J. H.

Washington, D. C., Attorneys for Complainants.

No. 11.—*Allegation in petition setting up defense of carrier*¹²

The complainants are informed and believe and upon information and belief aver that the defendant, The C. V. R. Company, attempt to justify its refusal aforesaid upon the alleged ground that said carrier has a right to make low rates upon crude limestone, ground limestone, and lime in earloads to the various shipping destinations hereinbefore mentioned for the express purpose of establishing a lime and limestone enterprise at Bunker Hill and deny the same rates to other points upon its line, and also to traffic originating upon other lines and delivered to it; that complainants are advised that said position is wholly without authority of law, and that however laudable it may be to establish industries upon the line of a carrier subject to the act to regulate commerce, such purpose cannot be used to sustain or excuse a violation of the act.

No. 11a.—*Form prescribed for special reparation cases*

BEFORE THE INTERSTATE COMMERCE COMMISSION

(Special Docket No.)

.....	}	Complainant's No.
Complainant..	 Co. Claim No.
v.	 Co. Claim No.
.....	 Co. Claim No.
.....		Request for authority to refund
Defendant..		\$.....

To the Interstate Commerce Commission:

The Company respectfully requests an order herein authorizing the payment to the above-named claimant.., of, State of of the sum of dollars (\$.....), as special repara-

¹¹ From Standard Lime & Stone Co. v. C. V. R. Co. (I. C. C. Docket No. 1650).

¹² From petition in Standard Lime & Stone Co. v. C. V. R. Co. (I. C. C. Docket No. 1650). (See sec. 77.)

tion in connection with the following shipment.: Commodity
, number of shipments or carloads, aggregate weight
 From (insert point of origin) to (insert destination). Con-
 signor, consignee Bill of lading issued by
 (use initials) Co., at Date, 190... Shipment..
 moved as follows:

..... (use initials) Co., from to, via

..... (use initials) Co., from to, via

..... (use initials) Co., from to, via

Aggregate freight charges actually collected, \$....., date paid,
, 190...

By whom paid, (consignor or consignee).

(If through rate lawfully applicable, use these spaces.)

Rate lawfully applicable per ton or cwt., carload min.
 for ft. car.

Tariff authority, I. C. C. No., page, effective

(If local rates lawfully applicable, use these spaces.)

Local from	To	Rate	C.L. Min.	Name of tariff	I.C.C. No.	Page	Date effective.
.....
.....
.....
.....

Rate sought to be applied per ton or cwt. carload
 min. wt. for ft. car.

Tariff authority, I. C. C. No., page, effective

Aggregate freight charges at claimed rate would be \$.....

Explanation and comments: (Here may follow such general com-
 ments or explanation as the case may require. In case shipment was
 reconsigned, state date of reconsigning order, point of reconsignment,
 and tariff authority for reconsignment. In case shipment was mis-
 routed by initial carrier, state routing instructions given by con-
 signor, if any, and the proper route in detail; with specific admission
 that misrouting was the result of error of carrier's agent, if such
 was the fact.)

STATEMENT OF BILLING

(The information in this statement of billing must correspond with the checked billing of the auditing department. If additional space is required, carrier may use its own standard form.)

Waybilled from to, via

Date 190	W. B.	Car initial and number.	Articles.	Weight.	Freight.		Advances.		Total.	
					Rate.	Amt.	Rate.	Amt.	Rate.	Amt.
.....										
.....										
.....										
.....										

It is certified that the facts as stated in the foregoing application are correct.

It is admitted that the rate lawfully applicable at the time and over the route shipment moved was, under all the circumstances and conditions then existing, excessive and unreasonable.*

It is agreed that the order of the Commission authorizing refund herein may require that the published tariff rates and rules upon which adjustment is based shall be maintained (as maxima) for a period of one year from the date this application is filed.*

Respectfully submitted.

..... Company,
Defendant,

....., By
(City.) (State.) (Personal signature.)

..... 190.. Its
(An executive or general officer.)

The undersigned companies join in the foregoing application (*signatures as above*).

* In misrouting cases this statement will be treated as surplusage.

INSTRUCTIONS FOR FORM 11a

1. The Commission will not ordinarily take favorable action on an application for special reparation authority where the case is not presented to it within six months after the shipment moved, unless the rate on which the adjustment is sought was actually established within six months after the date of the movement.

2. Under section 16 of the act to regulate commerce, as interpreted by the Commission, all claims for reparation are absolutely barred if not filed within two years from the time the cause of action accrues.

3. This application should be accompanied by the original paid freight bills and all correspondence comprising the investigation and handling of the claim by the carriers. Such bills and papers will be returned by the Commission after the claim has been acted upon.

4. When special reparation is authorized on a shipment moving between two points under a certain rate, similar action will be taken by the Commission on all subsequent applications covering shipments of the same commodity under the same rate and between the same points at the same or a subsequent date, without incorporating in the subsequent orders a clause requiring the observance of the reduced rate as a maximum for one year. It is therefore important in any application involving a rate that has already been acted upon, that the Commission be advised of that fact by proper reference under the space for Remarks.

5. The Commission will authorize payment only to the consignor or consignee, and not in favor of an assignee. In cases where the application is in favor of the person shown on the attached shipping papers to have directly paid the freight charges, such order as may be entered will read in favor of that person; but where the application is for authority to refund to the consignee when the papers show that the charges were paid by the consignor, or *vice versa*, the Commission requires that a stipulation be filed with the application signed by the consignor, by the consignee, and by an executive or general officer of the carrier in substantially the following form:

TITLE. (Here insert names of complainant and defendants as in application to which stipulation relates.)

The undersigned, the consignor of the following-described shipment (here insert date, car number, commodity, and points of origin and destination) and, the consignee thereof, and the undersigned Rail. Company, stipulate and agree that any order entered in the above-entitled informal complaint for a refund on account of the excessive freight charges collected on said

shipment shall be in favor of (here insert name of consignor or consignee, as case may be).

.....
(Signature of consignor.)

.....
(Signature of consignee.)

.....
Rail Co.

By

Its

(An executive or general officer.)

FORMS FOR USE BEFORE THE COURTS

- No. 12. Bill by the Commission to enforce its orders.
No. 13. Bill to enjoin, set aside, and annul order of the Commission, involving a practice.
No. 14. Bill to enjoin, set aside and annul order of the Commission, involving reasonableness of a rate.
No. 14a. Bill to enjoin, set aside, and annul order of the Commission, another form.
No. 14b. Bill to enjoin order of the Commission, another form.
No. 15. Order of the court why injunction should not issue.
No. 16. Notice of application for an order.
No. 16a. Notice of passage of order.
No. 17. Notice of order, why injunction should not issue.
-

No. 12.—*Bill by Interstate Commerce Commission to enforce its order*¹

(CAPTION)

*To the Circuit Court of the United States sitting within and for the
.....District of the State of:*

Your petitioner, the Interstate Commerce Commission, which was created and established and now exists under and by virtue of an act of the Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by an act approved March 2, 1889, and as amended by an act approved February 10, 1891, and an act approved February 11, 1893, and an act approved February 19, 1903, and an act approved June 29, 1906, humbly complains and sheweth:

I

That the A..... & B..... Railway Company is a corporation chartered and existing under and by virtue of the laws of the States

¹ Petition of Interstate Commerce Commission against the L. S. & M. S. R. Co., March, 1903, in the United States Circuit Court for the Northern District of Ohio, Eastern Division.

of and and, having its principal office in the city of, in the State of; that the C..... & D..... Railroad Company is a corporation chartered and existing under and by virtue of the laws of the State of, having its principal office in the city of, in said State.

II

That the said A..... & B..... Railway Company and the C..... & D..... Railroad Company, defendants herein, were on, to wit, the day of, 190., and since have been and are, common carriers engaged in the transportation of persons and property by railroad under joint through rates; and, as members of continuous lines between different points in the United States, particularly were and since have been so engaged in the transportation of between various points in the several States of the United States, including points in the States of and; and as such common carriers and in respect to such transportation were and are subject to the provisions of the said act entitled "An act to regulate commerce" and acts amendatory thereof and supplementary thereto.

III

That heretofore, to wit, on the day of, 190., the M..... N..... association, a corporation under the laws of the State of, filed, under section 13 of said act to regulate commerce, a petition, and complained to the petitioner herein, the Interstate Commerce Commission, alleging violations on the part of the said defendants of certain portions of said act, as at large and more fully appears in and by said complaint on file in the office of said Commission, a copy whereof is hereunto annexed and made a part of this bill of complaint, marked "Exhibit A;" and that a copy of said complaint, Exhibit A herein, under the seal of said Commission, was duly forwarded by said Commission to each of the said defendants, as required by section 13 of said act.

IV

(a) That thereafter, to wit, on the day of, 190., the said A..... & B..... Railway Company filed an answer to said complaint, Exhibit A herein, as at large and more fully appears in and by said answer on file in the office of the petitioner herein, a copy of which said answer is hereto annexed and made a part of this petition, marked "Exhibit B."

(b) (Same allegations as to other defendants).

V

That thereafterwards, the said cause, being at issue upon the pleadings aforesaid, duly came on for investigation and hearing before the petitioner herein, the Interstate Commerce Commission, and at, in the State of, on the day of, 190., and at (other places where hearings were held) the said M. N. association, as well as the defendants herein, the A. & B. Railway Company and the C. & D. Railroad Company, duly appeared by their attorneys, and at the said hearings testimony was taken on behalf of the said parties; that thereafter, to wit, on the day of, 190., the said parties appeared by their attorneys in the city of Washington, District of Columbia, and argument was had in behalf of all parties in interest.

VI

That thereafterwards, to wit on the day of, 190., the petitioner herein duly determined the matter in controversy between the said parties before it, and made a report in writing in respect thereto, setting forth the conclusions it had reached and also the findings of fact upon which the said conclusions were based, as at large and more fully appears in and by the report of said Commission, a copy of which is hereunto annexed and made a part of this petition as "Exhibit ..."

VII

That after the determination of the said cause, as aforesaid, to wit, on the day of, 190., the petitioner duly formulated an order, which said order, in conformity with the conclusions of this petitioner, set forth in its report (Exhibit .. herein), directed the said defendant, the A. & B. Railway Company and the C. & D. Railroad Company, to cease and desist on or before the day of, 190., from exacting or charging certain specified rates upon the transportation of property between certain points, as more fully appears by said order.

That said order reads as follows: (Here set out in full the order, or refer to it as an exhibit).

VIII

That thereafter the petitioner, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said opinion (Exhibit .. herein), together with a copy of the order (Exhibit .. herein) to be delivered to each of the said defendants,

the A..... & B..... Railway Company and the C..... & D..... Railroad Company; and petitioner shows that the said defendants, unmindful of their duty in that regard, have, through their officers, servants, and attorneys, wholly disregarded and set at naught said order of petitioner (Exhibit .. herein), and wilfully and knowingly violated and disobeyed the same, and still do neglect and refuse to comply with the same or any part thereof.

IX

And the petitioner charges that the action of the defendants, in exacting, charging, and compelling shippers of, between, in the State of, and in, in the State of, are in violation of section 1 of the act to regulate commerce, in that said rates are unreasonable and unjust, and that said rates are and have been in violation of section 3 of the said act, in that said rates create an undue and unreasonable preference or advantage to other descriptions of traffic, and create an undue and unreasonable prejudice and disadvantage to the transportation of in car lots.

Wherefore, The petitioner prays:

1. That a subpoena or other suitable process may issue, according to the course of equity, requiring the A..... & B..... Railway Company and the C..... & D..... Railroad Company to appear at such time and place as this honorable court may determine, then and there to make full, complete, and perfect answer to all the matters and things hereinbefore stated and charged, as fully and particularly as if each of the said defendants were severally interrogated in regard thereto, but not under oath, which is hereby waived.

2. That upon the filing of this petition, an order may be made by this honorable court, directing the method of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed, pending the cause, as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

4. That such order or orders may be passed, pending the cause, as may be necessary for the prosecution of all such inquiries as the Court may think needful and lawful to enable it to form just judgment in the matters and things stated and charged in the foregoing petition.

5. That upon final hearing a decree may be entered granting to petitioner a writ of injunction, or other proper process, mandatory or otherwise, to restrain the said defendants, the A..... & B..... Railway Company and the C..... & D..... Railroad Company, and each of them, and their officers, servants, and agents, from con-

tinuing in their violation of and disobedience to the said order of the petitioner, the Interstate Commerce Commission.

6. That a decree may be entered requiring the defendants (naming them), and each of them, to pay such sum of money, not exceeding the sum of dollars, for every day after a day to be named in such decree that they each, respectively, fail to obey the said injunction or other proper process.

7. That a decree may be entered requiring the defendants (naming them) to pay the cost of this proceeding and reasonable counsel fees.

8. For such other and further relief as to the court may seem meet and just and the equities of the cause may require.

THE INTERSTATE COMMERCE COMMISSION,

By (*The Secretary thereof, thereunto duly authorized.*)

[SEAL.]

E..... F.....,

(*United States Attorney,, District of prosecuting this suit by direction of the Attorney-General of the United States.*)

No. 13.—*Bill to enjoin, set aside and annul order of Commission, involving a practice*²

In the Circuit Court of the United States for the District of
.....

A.... & B.... RAILWAY COMPANY,	}
Complainant.	
v.	
INTERSTATE COMMERCE COMMISSION,	
and E.... F.... and G.... H....	}
trading as F.... & Co.,	
Defendants.	

To the Honorable Judges of the Circuit Court of the United States for the District of

The A..... B..... Railway Company, a railroad corporation duly organized and existing under the laws of the State of, and a citizen of the State of, and having its principal place of business and its principal operating office in the city of, State of, within the said District, brings this bill against the Interstate Commerce Commission, duly constituted, organized and existing under and by virtue of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and the acts amenda-

² Adapted from the *D. L. & W. R. Co. v. I. C. C.*, in the Circuit Court of the United States for the Southern District of New York, June, 1907.

tory thereof and supplementary thereto, and especially the act of June 29, 1906, and E..... F..... and G..... H....., copartners doing business under the firm name and style of F..... & Company, citizens of the County of, State of

And thereupon your orator complains and says, that your orator is and was at all times hereinafter mentioned, a railroad corporation duly created by and organized and existing under the laws of the State of and is and was at all said times a citizen of said State and a common carrier engaged in interstate commerce and in commerce with the States of and in the transportation of passengers and property by railroad between (terminus) in the State of and (terminus) in the State of, and between points in the State of and points in the States of and

That the defendants E..... F..... and G..... H..... were at all of the times herein mentioned, and now are, copartners in trade, doing business under the firm name of F..... & Company, having their principal office and place of business at, in the State of, and are engaged in the sale of That said F..... & Company now have, and at all times herein mentioned did have and maintain at the said place (describe the particular place), a plant for the purpose of; that the said copartners established the said business at the place aforesaid in the year, and have since and down to the present time continued the same. That each of said persons is and was at the times herein mentioned a citizen and resident of the city of, State of

(Then set out such matters in connection with the particular controversy, concerning the customs of the complainant and of the defendants and other users of transportation facilities, as may be appropriate in the case.)

And your orator further avers that on or about the day of, 190.., the said defendants, F..... & Company, duly filed with the Interstate Commerce Commission at Washington, D. C., their petition in writing, a copy of which is hereto attached and is hereby referred to and made a part hereof. That in and by said petition, as will more fully appear thereby, the said defendants, F..... & Company, pray that your orator be required to (state relief prayed for and granted).

That thereafter, and on the day of, 19.., upon the said petition, the said Interstate Commerce Commission required your orator to satisfy the complaint of the said defendants, F..... & Company, hereinabove referred to, or to answer the same in writing within days from the date of said order; that thereafter your orator duly filed and served its answer to the said petition, a copy

of which answer is hereto attached and hereby referred to and made a part hereof; that thereafter the issue joined by the said petition and the answer was assigned for hearing before the said Commission on the day of, 19...; that the said hearing was had and the proofs of the parties taken; whereupon, after hearing arguments of counsel, and on the day of, 190..., said defendant, the Interstate Commerce Commission, notwithstanding that the facts hereinbefore related were proved and established at said hearing, made and filed the report and order of the Commission, in and by which the said Interstate Commerce Commission ordered:

(Quote order issued by the Commission.)

That a certified copy of the said report and order was thereafter, on or about the day of, served upon your orator both by the Interstate Commerce Commission and by the said defendants, F..... & Company. That attached to the order served upon your orator by the said F..... & Company was a notice to the effect that it demanded of your orator that he comply with the terms and provisions of the said order on or before the day of (date named in the order for its taking effect), a copy of which said report and order is hereto attached and hereby referred to and made a part hereof.

And your orator further avers that the said defendant, the Interstate Commerce Commission, and the said defendants, F..... & Company, intend to enforce the provisions of the said order, dated on the day of, 190..., hereinbefore referred to, either by mandamus or by writ of injunction, as provided in the said act to regulate commerce, hereinbefore referred to, provided your orator does not by the day of, comply with the terms thereof.

And your orator further avers that the said order, as made and filed by the Interstate Commerce Commission, as aforesaid, is illegal, null, and void, and that the defendant, the Interstate Commerce Commission, had no jurisdiction, power, or authority of law to make the same; (then may be set out the peculiar features of the particular case, as far as the parties complainant before the Commission are concerned). That the said defendant, the Interstate Commerce Commission, is constituted, organized, and existing under the said acts of Congress hereinbefore referred to, and that it has no power or authority other than that given and conferred upon it by said acts.

That the said order imposes an unjust, unreasonable, and illegal restriction upon interstate commerce and upon the right to the use, control, and management of its business, which your orator has and should have and enjoy, against which it has no adequate remedy at law.

Your orator therefore prays that a writ of injunction, both tem-

porarily and permanently, may issue out of this court, directed to the defendants, enjoining them, and each of them, both permanently and during the pendency of this action, and until the further order of the Court herein, from in any manner enforcing or attempting to enforce the said order of the Interstate Commerce Commission, dated the day of, hereinbefore referred to, and from beginning or attempting to begin any action or proceeding for the purpose of enforcing or attempting to enforce the said order, or of compelling or obliging your orator to allow or permit those things commanded in the order to be permitted.

And that a decree be granted herein, setting aside, declaring null and void the order of the defendant, the Interstate Commerce Commission, made and filed against your orator on the day of, 190..., and for such further or different relief as to the court may seem just and equitable, together with the costs of this action.

To the end, therefore, that the defendants may, if they can show why your orator should not have the relief hereby prayed, full true, direct, and perfect answer make, according to the best of the knowledge, remembrance, information, and belief of the proper members of the said defendant Commission and of the said defendants, F..... & Company, but not under oath (answer under oath being hereby expressly waived), to the several matters herein charged, as full and particularly as if the same were here repeated and the defendants especially interrogated as to each and every of such matters.

May it please your honors to grant unto your orator a writ of subpoena and respondendum, issuing out of and under the seal of this honorable Court, directed to the said defendants, the Interstate Commerce Commission, and said F..... & Company, commanding them, by a day certain and under a certain penalty, to be and appear in this honorable Court, then and there to answer to the premises and to stand and abide by such order and decree as may be made against them.

A..... & B..... RAILWAY COMPANY,
W..... V....., *General Attorney.*

[SEAL]

M..... N.....,
Solicitor for Complainant.

.....
(Address)

(Usual jurat).

Exhibits: 1, Original petition; 2, certified copy of order.

No. 14.—*Bill to enjoin, set aside and annul an order of Commission, involving a reasonable rate*^a

(CAPTION)

Address:

A..... B....., a citizen of the State of; G..... H....., a corporation organized under the laws of the State of and (naming other complainants) bring this their bill against the Interstate Commerce Commission, established and existing under and by virtue of an act of Congress of the United States. And thereupon your orators complain and say:

That on the day of, 19.., in a certain cause then pending in the Circuit Court of the United States within and for the District of, wherein J..... K..... and the others were complainants and the Railway Company were defendants, after due proceedings having been had for that purpose in all respects in accordance with law, your orator, A..... B..... was duly appointed receiver of the road, and was duly qualified as such receiver, and is now, as such receiver, in possession of the railway properties of the road, and is now operating the same as such receiver; that the G..... H..... Railway Company is a corporation duly organized under and by virtue of the laws of the State of (describe other complainants in the same way); that the defendant, the Interstate Commerce Commission, has been created and established, and, during all the times herein mentioned, has existed under and by virtue of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and acts amendatory thereof.

Your orators further aver that your orator, A..... B....., as receiver, as aforesaid, have their principal operating office in the city of, in the State of, and that said road is engaged in interstate commerce, transporting passengers and property between and among the States of,, and

(Then set out the particular facts applicable to the pending matter).

Your orators further aver that they have established and duly filed, published, and posted, according to law, tariffs of charges for the transportation of, some of the rates being for the transportation of entirely upon the lines of the company issuing said tariff, and a large number of other tariffs being joint tariffs issued by your orators in connection with other companies.

(Then set out historically the essential facts leading up to the filing of the petition by the original complainants).

^a Adapted from *A. B. Stickney v. I. C. C.*, in the Circuit Court of the United States within and for the District of Minnesota, May, 1908.

(Set up the filing of the petition by the original complainants and the making and serving of the order by the Interstate Commerce Commission).

(Allege that the order is unreasonable, unjust, oppressive, and unlawful, and the reasons therefor).

(That the enforcement of the order would compel the complainants to perform a service without adequate remuneration, or at a loss).

(It may be alleged that the enforcement of the order would lead to very many suits for penalties by persons interested in the order in many of the judicial districts of the United States, by which multiplicity of suits much loss and damage would be inflicted upon complainants and embarrass them in their business).

(That the Interstate Commerce Commission, unless the operation of the order is enjoined or suspended, will institute judicial proceedings for the recovery of the penalties).

(Prayer for temporary or interlocutory order suspending the order of the Commission and restraining it from instituting proceedings to enforce the order, and for a permanent injunction upon final hearing).

(Prayer for general relief and subpoena).

(Signatures of Complainants.)

.....

(Name of Counsel)

.....

(Address)

(Usual verification).

No. 14a.—*Bill to enjoin, set aside and annul an order of the Commission* *

(CAPTION)

Address:

Northern Pacific Railway Company, a corporation organized under the laws of the State of Minnesota; Chicago, Burlington and Quincy Railroad Company, a corporation organized under the laws of the State of Illinois; Union Pacific Railroad Company, a corporation organized under the laws of the State of Utah; Oregon Short Line Railroad Company, a corporation organized under the laws of the State of Utah, and Oregon Railroad & Navigation Company, a corporation organized under the laws of Oregon, bring this, their amended bill, against the Interstate Commerce Commission, established and existing under and by virtue of an act of the Congress of the United States.

* Amended bill of complaint in N. P. R. Co. v. I. C. C., Circuit Court, Minnesota (Equity No. 884), October 20, 1908.

And thereupon your orators complain and say:

I

That the Northern Pacific Railway Company is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin; that the Great Northern Railway Company is a corporation duly organized and existing under the laws of the State of Minnesota; that the Chicago, Burlington and Quincy Railroad Company is a corporation duly organized and existing under the laws of the State of Illinois; that the Union Pacific Railroad Company is a corporation duly organized and existing under the laws of the State of Utah; that the Oregon Short Line Railroad Company is a corporation duly organized and existing under the laws of the State of Utah, and that the Oregon Railroad and Navigation Company is a corporation duly organized and existing under the laws of the State of Oregon; that the defendant, the Interstate Commerce Commission, has been created and established, and during all the times herein mentioned has existed, under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof.

Your orators further show that the Northern Pacific Railway Company has its principal operating office in the city of St. Paul in the district of Minnesota, third division thereof.

II

Your orators further show that the Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Burlington and Quincy Railroad Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon Railroad and Navigation Company are each common carriers, engaged in the transportation of property by railroad, by continuous carriage or shipment, from points in the State of Washington to points in the States of Montana, North Dakota, South Dakota, Minnesota, Wisconsin, Illinois, Iowa, Missouri, Kansas, Nebraska, Utah, and Colorado, and have been so engaged for many years past, and a large proportion of the property so transported by your orators is and has been lumber, shingles, and other forest products produced at points in the State of Washington. That for the purpose of transporting the lumber, shingles and other forest products so produced in the State of Washington, to points of consumption in the States above named, your orators have established and maintained through routes and joint rates over their lines and the lines of connecting railways from said points in the State of Washington to destination in said other States.

III

The rates for the transportation of lumber, shingles and forest products from points in the State of Washington over the lines of your orators' railways to points thereon in the States above mentioned and to points in said States and other States over lines of connecting railways, which rates were in effect on October 31, 1907, and which had been in effect for a long time before that date, were prescribed in certain tariffs duly filed, published, and posted under the provisions of the act entitled "An act to regulate commerce." These tariffs are known and described as follows: S. R. 662, I. C. C. No. 564; G. N. G. F. O. 9838, I. C. C. No. A-1101; G. N. G. F. O. 13051, I. C. C. No. A-1427; G. N. G. F. O. 17526, I. C. C. No. A-2231; G. N. G. F. O. 18025, I. C. C. No. A-2427; G. N. G. F. O. 18837, I. C. C. No. A-2661; Northern Pacific No. 23275, I. C. C. No. A-3095 and Northern Pacific No. 20285, I. C. C. No. B-479, and are too voluminous to be set out in this amended bill of complaint, but true copies thereof have been filed with the original bill of complaint in this cause, and reference thereto is hereby prayed as if the same were made a part of this amended bill of complaint, the said tariffs being marked respectively exhibits 1 to 8 inclusive.

IV

That more than thirty days previous to Nov. 1, 1907, your orators, together with a large number of other carriers, filed, published and posted, in accordance with the provisions of that certain act of Congress, entitled 'An act to regulate commerce,' approved February 4, 1887, and the acts amendatory thereof, a certain tariff known as 'Transcontinental Freight Bureau Eastbound Special Tariff No. S. R. 963, I. C. C. No. 850,' with supplements 1 and 2, which became effective Nov. 1, 1907, wherein rates were prescribed for the transportation of lumber, shingles and forest products from points in the State of Washington to points in North Dakota, South Dakota, Montana, Minnesota, Wisconsin, Iowa, Illinois, Missouri, Nebraska, Arkansas, Louisiana, Texas, Oklahoma, New Mexico, Colorado, Kansas, Utah and Wyoming, and at or about the same time, your orator, Great Northern Railway Company, filed, published and posted, under the provisions of said act of Congress, a certain local and joint tariff known as Great Northern I. C. C. No. A-2667, which prescribed the rates for the transportation of lumber, shingles and forest products from points in the State of Washington to points in Oregon, Washington, Idaho, Montana, Alberta, and British Columbia, which said tariff, and the rates therein prescribed, became effective on November 1, 1907. And at or about the same time your orator, Northern Pacific Railway Company, filed, published and posted a certain local and

joint tariff prescribing rates for the transportation of lumber, shingles, and forest products from points in the States of Washington to points in Idaho, Montana, and North Dakota, which rates became effective on November 2, 1907, said tariff being I. C. C. No. A-3432.

That said tariffs above described are too voluminous to be set out in this amended bill of complaint; that true copies thereof have been filed with the original bill of complaint in this cause, and reference thereto is hereby prayed, as if the same were made a part of this amended bill of complaint, the said tariff I. C. C. No. 850 being marked "Exhibit 9," the said tariff I. C. C. No. A-2667 being marked "Exhibit 10," and the said tariff I. C. C. No. A-3432 being marked "Exhibit 11."

That in and by said tariffs so filed, published, and posted, the articles or commodities therein described were designated as groups A, B, C. and D, and by the terms thereof Group A comprised shingles, Group B comprised lumber, poles, piling and timbers of cedar of single car lengths and certain articles manufactured from cedar, Group C comprised lumber, poles, piling, and timbers of fir, hemlock, larch, pine, and spruce of single car lengths and certain articles manufactured therefrom, and Group D comprised long timbers, poles, piling, or lumber requiring two or more cars for transportation.

V

That the rates named in said tariffs so filed, published, and posted thereupon became, were, and are the only lawful rates for the transportation of the various commodities comprised within said four groups from each and all of the points in the State of Washington named in said tariffs to each and all of the points of destination in said other States named in said tariffs, and said rates, and each and all of them, were, on November 1, 1907, ever since have been and now are low for the service rendered and by comparison with other rates, and as such neither unreasonable nor unjust, and, as your orators verily believe, will continue so to be for the period of two years from October 15, 1908.

VI

That as soon as the said rates prescribed by the tariffs above mentioned become effective, two certain proceedings were commenced before the Interstate Commerce Commission, one entitled "Pacific Coast Lumber Manufacturers' Association and Others v. Northern Pacific Railway Company and Others," being cause No. 1329 before said Commission, and the other entitled "Southwest Washington Lumber Manufacturers' Association v. Northern Pacific Railway Company and Others," being cause No. 1335. In said cause No. 1329, the

Pacific Coast Lumber Manufacturers' Association and others complained against your orators and other carriers' parties to said tariffs, and in cause No. 1335, the Southwest Washington Lumber Manufacturers' Association complained against your orators and other carriers, parties to said tariffs, and the complainants in both of said causes alleged that they were engaged in the manufacture and interstate shipment and sale of lumber, shingles, and other forest products from points within to points without the State of Washington, the rates on which were fixed by said tariffs, and alleged that the rates fixed therein for the transportation of such commodities were unreasonable and unjust. Upon the filing of the complaints in said two causes, the defendant Interstate Commerce Commission required your orators, and the other carriers named as defendants in said proceedings, to answer the complaints of said complainants, and thereupon answers were duly filed by your orators, and upon the issues raised therein evidence was produced before the said Interstate Commerce Commission by such complainants and by your orators, and the matters in difference in said two causes were submitted to the Commission on March 20, 1908.

VII

Thereafter, and on June 2, 1908, the defendant Interstate Commerce Commission entered an order in said cause No. 1329, and in said cause No. 1335. (The orders of the Commission are then set out.)

XII

Your orators further show that the effect of the orders so entered by the defendant in said causes 1329 and 1335, if enforced, will be to reduce the rates fixed by the tariffs of your orators for the transportation of lumber, shingles, and forest products, from points within the State of Washington to points in the other States above mentioned, substantially five (5 c.) cents a hundred pounds, and in some instances more than five (5 c.) cents a hundred pounds.

XIII

Your orators aver and charge that in making said order and endeavoring to establish said rates, said Commission acted without warrant of law; that the said act of 1887 to regulate commerce, and the several acts amendatory thereof and supplementary thereto, particularly the amendment of June 29, 1906, under which said Commission professed to act, are in violation of the Constitution of the United States in that they profess to confer upon said Commission executive, legislative, and judicial powers. More specially pleading in this behalf your orators say: All through said acts administrative

powers are conferred upon the Commission. In section 15 the Commission is authorized to act as a court, to take judicial cognizance of complaints filed for damages, and after hearing to award damages, which no carrier against whom the award has been made can resist except by assuming the burden of proof and overthrowing the *prima facie* effect of the Commission's award. The award can be resisted only under penalty of the carriers paying not only the usual costs of suit, but an attorney's fee to complainant in addition.

By section 15 of the said act, said Commission is authorized and empowered, after a hearing upon complaint, whenever in its opinion any rate or charge demanded, charged or collected by any carrier subject to the act is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, to determine and prescribe what will be the just and reasonable rate or charge to be thereafter observed in such case as the maximum to be charged, and to make an order that the carrier shall cease and desist from demanding, charging, or collecting the rate or charge complained of and condemned by said Commission, and shall not, thereafter for a period not exceeding two years, publish, demand, or collect any rate or charge in excess of the maximum rate or charge so prescribed by said Commission as a substitute for the rate or charge condemned.

Under the provisions of said section and of section 13 of the act, in which the complaint containing a statement of the charges made is more particularly provided for, the Commission is empowered to proceed, and the proceeding itself is against the particular carrier or carriers, and such carrier or carriers only as are charged with unreasonableness in the matter of its or their rates; and upon hearing and trial of such carrier or carriers in said proceeding, the said Commission, under the aforesaid sections, is authorized to adjudge the rate or charge of said particular carrier or carriers to be unreasonable, and as a consequence thereof to adjudge against said particular carrier or carriers another different and lower rate as the maximum to be charged by such particular carrier or carriers in such case, for a period not exceeding two years. Such proceedings, hearing, trial, determination, and judgment involve and require the exercise of judicial power by the said Commission, and it is not competent for Congress to invest said Commission with such power; and any investiture, distribution, or exercise of such power in, to or by said Commission is in violation of the Constitution of the United States, and particularly so much thereof as provides for the distribution and exercise of the judicial authority of the United States; and herein reference is made to section 1 of Article III of the Constitution of the United States; and the Commission has and possesses no such judicial power.

Further pleading as to that provision of section 15 of the act to regulate commerce as amended, which declares that the Commission shall prescribe what shall be the reasonable rate or rates, charge or charges, to be observed as the maximum to be charged, your orators say this provision is contrary to the Constitution of the United States, and especially to section 1, article I, above quoted, in that, by that article all legislative power is confined to the Congress of the United States. The prescribing of a maximum rate which carriers may charge is a legislative function. Congress has not prescribed for, but by said act delegates this power to the Commission, and in doing so places in its hands legislative power.

XIV

Your orators aver that in and by section 1 of the said act to regulate commerce it is provided that all charges made by any common carrier subject to the act, for any service rendered or to be rendered in the transportation of property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. That your orators, as the owners and operators of the railroads herein above described, and the franchises, equipment, and appurtenances connected with such railroads, are entitled to the possession, management, and beneficial use thereof, and are authorized to establish rates for the transportation of freight thereover, subject only to the provision that such rates shall be just and reasonable. In and by section 15 of the said act, the Interstate Commerce Commission is authorized and empowered, after hearing upon complaint, whenever it shall be of the opinion that any of the rates or charges demanded or charged or collected by any common carrier for the transportation of property as defined in the first section of the act are unjust or unreasonable or otherwise in violation of any of the provisions of the act to determine and prescribe what will be a just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and to make an order that the carriers shall cease and desist from such violation to the extent that the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed. That in and by said section 15 of said act it is provided that all orders of the Commission prescribing rates shall take effect within a reasonable time, and not less than thirty days after the making of the same, and shall continue in force for such period, not exceeding two years, as established and prescribed by the order of the Commission, unless the same shall be suspended or modified or set aside by the Commissioners, or be suspended or set

aside by a court of competent jurisdiction. That in and by the sixteenth section of the said act it is provided that any carrier or any officer or agent of any carrier, who knowingly fails or neglects to obey any order of the Commission prescribing rates as provided in said section of the act, shall forfeit to the United States the sum of \$5,000 for each offense, and each distinct violation shall be deemed a separate offense, and in case of continuing violation, each day shall be deemed a separate offense.

Your orators aver that the present rates attempted to be set aside by said order, but fixed and established by your orators for the transportation of lumber, shingles, and other forest products from points aforesaid mentioned in the order of the said Commission, and each of the said rates, are and will be for more than three years hence, low, just, and reasonable rates for the service performed in the transportation of said commodities between said places and each of them, and that the rates prescribed by the Commission in and by its order, are, and each of said rates is and will be for more than three years hence, unjust and unreasonable for the service performed in the transportation of lumber, shingles, and other forest products and are and will be inadequate compensation to your orators for the service rendered.

Your orators aver that by Article V of the amendments to the Constitution of the United States your orators have the right to a judicial investigation in a court by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy of the question as to the reasonableness of the said rates so fixed and established by your orators, and of the question as to the reasonableness of the said rates so fixed and established by the said Commission as aforesaid, and of each of said questions.

That the attempt of the Commission in and by said order sought to be set aside herein, to set aside and annul the rates established by your orators, and the establishing of the said rates prescribed by said orders and each of them by the said Commission, against the will of your orators was *pro tanto* the taking of the property of your orators and depriving your orators thereof without due process of law, in violation of Article V of the amendments to the Constitution of the United States; and that the making of the said order of the Commission herein set out was *pro tanto* a taking and depriving the company of its property without due process of law, in violation of Article V of the amendments to the Constitution of the United States, and thereby void and of no effect.

Your orators further aver that the attempt of sections 15 and 16 of the said interstate commerce act to make any order of the Commis-

sion prescribing rates to be charged for the transportation of property became effective of its own force prior to a hearing in a court of justice of the question of the reasonableness of the rates prescribed by said order and said sections 15 and 16 in that regard are void for the reason that in and by section 1, Article III of the Constitution of the United States all judicial power is conferred upon a Supreme Court of the United States and such inferior courts as the Congress may establish, and the judges of said Supreme Court and such inferior courts shall hold office during good behavior, and the said Commission has no power to prescribe any time upon which any order of the said Commission prescribing rates for the transportation of property to take effect, and that the said order of the said Commission is void and of no effect.

That section 16 of said act is unconstitutional and void in that it is therein provided that your orators and each of them, and any officer or agent of your orators, knowingly failing or neglecting to obey the said order of the Commission herein set forth, shall forfeit to the United States the sum of \$5,000 for each day that your orators or said officers or agents fail to obey said order, notwithstanding that the question of the reasonableness of the rates established by the said order has not been judicially investigated by due process of law in any court of justice, and in that said section makes said order a finality unless suspended by the Commission or by some court of competent jurisdiction, and subjects your orators to penalties and forfeitures as therein provided, and deprives your orators of their property without due process of law, contrary to Article V of the amendments to the Constitution of the United States, and the force and effect of said order sought to be enjoined and set aside herein has been to compel your orators, in order to prevent their property from being forfeited through the operation of such penalties and to save the agents of your orators from being subjected to such penalties (notwithstanding such penalties are only imposed because of said orders of said Commission attempting to prescribe and establish such rates) to publish and put into effect on October 15, 1908, the unreasonably low rates so attempted to be prescribed by said Commission in and by said order, whereby your orators aver that their property has been and is now being taken from them against their will, and without due process of law, and without their having had a day in court and the right to a judicial investigation by a court under due process of law for the determination of the truth of the matter in controversy before said Commission.

XV

Your orators further show that the only authority sought to be vested in the defendant, Interstate Commerce Commission, to fix

rates for the transportation of property over the lines of your orators' railways is conferred by said section 15 of said amended act of Congress, approved June 29, 1906, by the terms whereof it is provided that whenever the said Commission shall, after a full hearing, be of the opinion that any of the rates or charges demanded, charged or collected by any common carrier or carriers, subject to the provisions of said act for the transportation of property, are unjust or unreasonable, it shall be authorized "to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be observed in such case as the maximum to be charged," and your orators further show that the said order so entered in said causes Nos. 1329 and 1335, on June 2, 1908, and the said orders amendatory thereof are further unauthorized and void, for the reason that your orators have at no time prescribed rates for the transportation of lumber, shingles, or forest products between the points named in said order in excess of charges which are just and reasonable. And furthermore, upon the hearing before the defendant in said causes in which said order was so entered, no evidence was considered or offered which in anywise showed or tended to show that the rates complained of therein were excessive, unjust or unreasonable, and the defendant, Interstate Commerce Commission, entered its said order without any justification therefor, and without any evidence or finding of fact that said rates so fixed by said defendant were excessive, unjust, or unreasonable.

XVI

Your orators further show that the rates for the transportation of lumber, shingles, and forest products from points within to points without the State of Washington, as fixed by the said tariffs, so in effect, on October 31, 1907, were substantially the same rates that were fixed by your orators in the year 1893, and solely by reason of the fact that said rates had been long continued was the conclusion reached by the defendant, Interstate Commerce Commission, that the rates complained of in said causes 1329 and 1335, which were and are higher than the rates theretofore in effect, were unreasonable and unjust, and solely by reason of this fact was said order so entered by the Commission, but your orators show, that it was established by uncontradicted evidence upon the hearing before the Commission, that the circumstances and conditions which existed at the time said previous rates were established did not exist on November 1 or 2, 1907, and did not exist at the time of said hearing, and had not existed for more than three years prior thereto. That it was established at the hearing before the defendant Commission by uncontradicted evidence that at the time said previous rates were established the condition of

the lumber market in the United States was such that the lumber product of the State of Washington could not move to other States in any considerable quantity at rates higher than those so established, but that the conditions in this respect have been gradually changing by reason of the exhaustion of the timber supply in Michigan, Minnesota, and Wisconsin, and the rapid increase in the value of the yellow-pine product of the Southern States, so that it was established at said hearing by uncontradicted evidence that for a period of at least three years before November 1, 1907, the occasion for maintaining rates so low as those established in 1893 had ceased. And your orators further aver that the said defendant Commission in the determination of the issues involved in said complaint expressly found that in and prior to the year 1893 the lumber interests in the States of Washington and Oregon were in their infancy, and except for purely local consumption mills located therein disposed of their surplus at points reached by water transportation, and that the volume of business was small for a considerable time even after the railroads of your orators reached the coast; that prior to the year 1893 the rates on lumber and forest products from said States to Omaha, St. Paul, and other Eastern destinations were higher than the rates established in 1893, and that under said higher rates little, if any, of the lumber in said States moved eastward to said eastern destinations; at that time and for several years thereafter and until the practical disappearance of competition with white-pine lumber manufactured in Wisconsin, Minnesota, and Michigan, manufacturers of lumber in Washington and Oregon were unable to meet the competition of southern yellow pine and northern white pine in the States hereinbefore referred to, but that following upon the reduction in said rates inaugurated in 1893, the lumber interests in said States of Oregon and Washington increased enormously and many mills were built in the interior so that at and for several years prior to the hearing of said complaint shipments were and had been constantly made in large amounts eastward by the lines of your orators to eastern markets, amounting to a large percentage of the output of said mills; and your orators further aver that it was expressly found to be a fact by the defendant Commission that during the period of time that elapsed after the reduction in said rates in 1893 down to the time of said hearing in the State of Washington the price of manufactured lumber had greatly increased with increasing profits to the manufacturer, resulting from the market thus secured to him through said reduced rates, and the general advance in price in said market during the years aforesaid, and the generally prosperous conditions surrounding the manufacture and sale of lumber in the States hereinbefore referred to, whereby your orators aver that the Commission

found that each and every of the conditions surrounding the lumber industry had completely changed from the time said rates were established in 1893, and that the prosperous condition of said industry on and for more than three years prior to November 1, 1907, did not require or justify the further maintenance of rates so low as those established in 1893, under the circumstances aforesaid. It was also shown by uncontradicted evidence at said hearing that your orators established and maintained the rates in effect before November 1, 1907, for the reason that in 1893, and for many years thereafter, the great volume of traffic moving over your orators' lines of railway was westbound, and the State of Washington and the neighboring territory furnished insufficient traffic to load eastbound the cars employed in moving the westbound traffic, and that the rates on lumber, shingles, and forest products were so fixed and at an abnormally low point to furnish loads for cars which would have otherwise moved east without revenue-producing freight, but that for some time before November 1, 1907, the conditions had so changed that it was necessary to haul empty cars to the State of Washington in order to furnish facilities for the movement of lumber, shingles, and forest products. It was also shown at said hearing by uncontradicted evidence that every other important element in the cost of transporting the commodities in question had greatly increased over the cost in 1893 and subsequent years. And your orators further aver that the defendant Commission expressly found in its determination of said complaints that in the year 1893, when said low rates were established, the empty car movement on the lines of your orators was eastbound, and that at that time and for some years thereafter the great volume of traffic moving over your orators' lines of railway was westbound; but your orators aver that said Commission also found that this condition in and about the transportation of lumber from the States of Oregon and Washington had likewise changed since said rates were established in that at and for several years prior to the hearing of said complaint the direction of the empty car movement on the lines of your orators has been reversed and the same is now westbound, and that your orators are now, and for several years prior to November 1, 1907, have been, compelled to haul westbound large numbers of empty cars for the purpose of furnishing equipment in the States of Oregon and Washington for the loading of lumber eastbound into the States hereinbefore referred to, where said lumber is now sold. And your orators further aver that the Commission not only expressly found that the volume of lumber shipped during the last few years over the lines of your orators eastbound had enormously increased and that the lumber interests engaged in said traffic have been extraordinarily prosperous in the past few years, but also found

that the density of traffic on the lines of your orators has increased to such an extent that it is more than can be advantageously handled on single-track roads such as the lines of your orators practically are, and that because of the increase in density of traffic aforesaid, your orators have been compelled to, and are now engaged in constructing double-track extensions in some cases, in order more advantageously and expeditiously to handle this increased traffic. Your orators further aver that the Commission found that the expense of operating railways has increased greatly in the past few years, especially the cost of labor and materials, over and above the expense of operation as it existed at and for a few years after the year 1893, and further found that the increased traffic of your orators has required additional working force and equipment, thus recognizing and establishing the contention of your orators that in the matter of transportation of lumber from the State of Washington the conditions had greatly changed from the conditions in force at the time said rates were established in 1893.

Your orators further show that the conditions with respect to the transportation of the commodities in question so existing on November 1, 1907, and for several years before that time, continued to the time of said hearing, as was shown by the uncontradicted evidence there produced, and as your orators are informed and believe, will continue for at least a period of two years from October 15, 1908. Your orators further show that notwithstanding the fact that it was so conclusively established at said hearing before the defendant Commission that such rates maintained by your orators before November 1, 1907, were established and maintained under conditions wholly different from those existing at the time the rates complained of took effect and at the time of the hearing, the defendant, Interstate Commerce Commission, held as a matter of law that the continuance of said previous rates raised a presumption that such higher rates were unjust and unreasonable, wherein said Commission acted erroneously and through a mistake and under a misapprehension of the law and without authority.

XVII

Your orators further show that the rates so fixed by the tariffs so becoming effective on November 1 and 2, 1907, are lower than the rates charged for any like service by any carriers in the United States, and lower than rates heretofore fixed by the defendant, Interstate Commerce Commission, for like services. The rates so fixed by said order are unremunerative and confiscatory in that, while it is not possible to accurately compute the actual cost involved in transporting a car of lumber from the State of Washington to eastern destinations,

nevertheless it is possible with substantial accuracy to determine whether or not the transportation of lumber aforesaid may be conducted without loss under the rates so fixed by said order, and your orators upon information and belief aver that the rates so fixed by said order are not and will not be sufficient to pay the cost of conducting the transportation aforesaid and any just or fair return upon the value of the property used in said transportation, and said rates so fixed by said order aforesaid bear to fair or just relation to the rates on other traffic moving over your orators' lines of railway, and the enforcement of said order of the defendant will impose an undue and unreasonable burden not only upon your orators but upon the shippers of other commodities.

Your orators further show that the enforcement of said order of the defendant will deprive your orators of revenue from the transportation of lumber, shingles, and forest products to which they would be entitled under the rates fixed by said tariffs so filed, published and posted to an amount of more than \$600,000 per year, and each of your orators, by the enforcement of said order, will be deprived of revenue in a sum greatly in excess of \$2,000 per year.

XVIII

Your orators, therefore, pray that a decree be entered herein setting aside and annulling the said orders of the defendant, Interstate Commerce Commission, in said causes Nos. 1329 and 1335, and perpetually enjoining the defendant and its members, their agents, servants, and representatives, from enforcing said orders, and from taking steps or instituting any proceedings for the enforcement of said orders.

And your orators further pray that such other and further relief be granted in the premises as justice and equity may require.

Your orators further pray that your honors grant unto your orators a writ of subpoena, directed to said Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified, to be and appear before your honors in this honorable court and then and there full, true, and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such order and decree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

No. 14b.—*Bill to enjoin order of the Commission, another form.*⁵

(CAPTION)

Address:

Your orator, The Baltimore and Ohio Railroad Company, respectfully shows as follows:

I

The Baltimore and Ohio Railroad Company is a corporation duly incorporated by the general assembly of Maryland by chapter 123 of the acts of 1826; and is a common carrier engaged in the transportation of property by railroad between points in Maryland and points in other States and in the District of Columbia, and has its principal operating office in the city of Baltimore and District of Maryland. The defendant, the Interstate Commerce Commission, has been created and exists, and at all times mentioned in this complaint has existed under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, and acts amendatory thereof and supplemental thereto.

The matter in dispute in this cause exceeds, exclusive of interest and costs, the sum or value of \$2,000.

II

On the 24th day of June, 1908, there was served upon your orator, in accordance with the provisions of said act to regulate commerce and amendments and supplements thereto, an order of the Interstate Commerce Commission entered June 2, 1908, in the case entitled "Rail and River Coal Company v. The Baltimore and Ohio Railroad Company, No. 1322," accompanying which order was a report from the Commission bearing the same date. Your orator files herewith a certified copy of said order and of said report, marked "Complainant's Exhibit, No. 1," and prays that it be taken as part of this bill of complaint. As fully appears in and by said order of the Commission and report accompanying the same, the Commission thereby assumes authority under section 15 of the interstate commerce act as amended June 29, 1906, to enter said order as one relating to or prescribing regulations or practices affecting the rates or charges demanded, charged or collected by your orator for the transportation of property, as defined in the first section of said interstate commerce act as so amended, and the said Commission does in and by said order require your orator on or before the 1st day of August, 1908, to

⁵ Adapted from *B. & O. R. Co. v. I. C. C.*, in Circuit Court of the United States for the District of Maryland, July, 1908.

cease and desist, and, during the period of at least two years thereafter, to abstain from maintaining and enforcing with respect to interstate shipments of coal the present practice or regulation of failing or refusing in times of coal car shortage to count railway fuel cars and leased or so-called private coal cars against the distributive shares of available system coal cars, to which the coal operators to whom said leased or so-called private coal cars belong or said foreign railway fuel cars are consigned are entitled according to the ratings of their respective mines, and does require your orator to establish on or before the 1st day of August, 1908, and during a period of at least two years thereafter to maintain and enforce with respect to interstate shipments of coal and the distribution of cars therefor a practice or regulation specified and prescribed in said order.

III

The system of railroads operated by your orator extends from Philadelphia, in the State of Pennsylvania, through that State and the States of Delaware, Maryland, West Virginia, Ohio, Indiana, and Illinois to the city of Chicago in the last named State, and through the States of Pennsylvania and Ohio to Cleveland, Lorain and Fairport on Lake Erie, and also comprises numerous branch lines and intersecting lines of railroad lying in the several States named and in the District of Columbia, the whole comprising a mileage of approximately 3,250 miles of railroad. In the practical operation of said system of railroads your orator must and does divide the same into operating divisions, of which there are 12, namely, the Philadelphia, Baltimore, Cumberland, Monongah, Wheeling, Ohio River, Cleveland, Newark, Connellsville, Pittsburg, New Castle and Chicago divisions; and with respect to interstate shipments of coal your orator must and does make distribution daily of cars therefor to the mines located on said respective operating divisions, such distribution or apportionment of cars being made between the mines on each respective operating division exclusively. The bituminous coal mines served by the system of railroads operated by your orator as aforesaid are situated in the States of Maryland, West Virginia, Pennsylvania and Ohio, and number approximately 340 separate and distinct mines, producing respectively coals of several diverse characters and uses, and shipping the same to several diverse markets. The mines in Maryland are located on the Cumberland division; the greater part of the mines in West Virginia are located on the Monongah division; the mines in Pennsylvania are located on the Connellsville and Pittsburg divisions; the mines in Ohio are located on the Wheeling, Cleveland and Newark divisions; and the mining operations of the Rail and River Coal Company, the complainant in the said case

before the Interstate Commerce Commission, are located on the Newark division, producing a fuel coal shipped entirely to western markets, and which has never been and cannot be marketed in the East.

IV

Your orator owns and controls, and has at all times herein mentioned owned and controlled, system coal cars sufficient in number and capacity to enable it fully to perform its duty as a common carrier in respect to the receipt and transportation of coal from all said mines. Said system coal cars number approximately 45,000, and have an aggregate tonnage capacity of more than 1,800,000 tons. Such coal car equipment during a considerable portion of each year is much larger than is required for the receipt and transportation of all coal tendered to your orator for carriage by mine operators, and during the greater part of each year is sufficient to enable your orator to receive and transport all coal so tendered to it. It would be sufficient at all times were it not for circumstances beyond your orator's control, which at times, and particularly during the winter months, prevent your orator from supplying mine operators with sufficient cars for the receipt and transportation of all such coal. Principal among such circumstances are the detention on foreign railroads of cars of your orator which have been consigned to points on such foreign railroads, and the very great fluctuations in the amount of coal tendered to your orator for carriage by the mines aforesaid. In order to provide for the equitable division of its system coal cars among mine operators at the times of car shortage above referred to, your orator has devised and put into effect on its system of railroads a uniform method of coal car distribution, whereby your orator's system coal car equipment available on each operating division is divided among the mines in proportion to the tonnage rating of such mines, which rating is in each case ascertained by a careful investigation of the actual capacity of the mine to produce and ship coal. Your orator has at all the times mentioned in this complaint kept its railroad equipped with motive power, employes, tracks, terminals, sidings and all other facilities amply adequate to enable it at all times promptly to transport all the coal cars hereinbefore or hereinafter mentioned, and the car shortages hereinbefore referred to have not in any degree been caused or increased by any deficiency in or lack of motive power, employes, tracks, terminals, sidings, or other facilities.

V

Beginning in the year 1852 your orator established on its line in respect of the coal trade a service of transportation in the cars of

others in addition to the service of transportation in its own cars. At the same time your orator adopted the rule that as to each class of service all shippers should be placed on a footing of equality, thereby permitting all shippers alike to avail themselves of either of such classes of service on the same terms. In establishing on such terms these two classes of transportation your orator followed the practice of English railroads and of several railroads in the United States pursuant to the requirements of their charter acts. The two classes of transportation thus established have ever since been continuously maintained by your orator in the same manner and in accordance with the rule of equality hereinbefore stated. Throughout this time the motive power, employes, tracks, terminals, sidings and all other facilities of your orator have at all times been provided with a view to the movement not only of the system cars which it owns and controls but also of the cars supplied by shippers, and have for many years been and are now amply sufficient for the prompt movement of all cars of both classes. Your orator has during all this time applied such motive power, employees, tracks, terminals, sidings and all other facilities to the use of both these classes of transportation without giving any preference to one as against the other. These two classes of transportation as maintained by your orator being thus separate and distinct, your orator could not justly and legally diminish, and therefore does not diminish the share of its system cars to which a mine is equitably entitled at times of car shortage because of the fact that the operator of such mine has provided other cars for the transportation of coal from that mine. In this respect the practice of your orator has been uniform ever since it established the second class of transportation in cars of others in 1852. Since that period the cars supplied by shippers for the carriage of their coal have increased in numbers from time to time as shippers have availed themselves of the class of transportation then established by your orator. Shippers of commodities other than coal have also availed themselves of this class of transportation. There are now in use on your orator's system of railroads approximately 1,500 private coal cars owned by seven mine operators.

The carriage of merchandise and commodities in the car of the shipper or consignee is, under the English act of 1854 (36 and 37 Vict. c. 48), defined as a class or description of "traffic." Under the acts in this country, State and Federal, it is generally defined as a class or description of "transportation;" but in both countries alike it is by statute and in practice a service distinct from the service rendered by the railroad carrier in the cars of the carrier. This branch of the railroad service did not originate with the carrier, but

originated in the requirements of the law and the demands of the producers, shippers and consumers of merchandise.

In this country, while this branch of the transportation service has been protected against encroachments of the carrier by such acts as that of 1849, in Pennsylvania (act of February 19, 1849, P. L. 79, section 18), and of 1878, in Maryland (Maryland laws of 1878, chapter 155, section 5, approved March 27, 1878), the force operating generally to compel the carrier to continue this class of transportation service side by side with the transportation service in its own cars has been the commercial force brought to bear by the producers, shippers and consumers of particular articles of merchandise which could be more economically handled by means of the transportation service in individual cars. The peculiar function of the railroad car in the bituminous coal trade is that it affords the most economical storage of the commodity between the miner and the consumer. The difficulty and great cost of storing bituminous coal, either at the mines or at points of consumption, have confined such storage in quantity to points reached by water. Wherever the railroad car can find access practically the only storage is in cars, because that method of doing business is the most economical method.

The unavoidable irregularities in the supply of cars, which the railroad carrier is able to furnish or can be compelled to furnish in the discharge of its common law or statutory obligations in that regard, have been considered by many producers and consumers, both in the past and in the present, as necessitating the acquisition by them of individual cars, in order to avail themselves of the transportation service in those cars, even though, as is the fact, such service is much more expensive to the owners of such cars than is the service rendered by the railroad in its own cars. The use of the car as the economical method of storing coal between the producer and consumer, has kept in existence in the coal trade the demand for the transportation service in individual cars, while in the course of railroad development that demand has ceased in many other lines of trade, because of the additional expense entailed upon the trader.

VI

In the coal trade there are now used in this service of transportation not only cars owned by the miners and shippers of coal, herein and in the order of the Commission referred to as "private coal cars," but also cars furnished to such shippers by consignees,—this latter class comprising cars supplied by manufacturing and industrial corporations and also cars supplied by foreign railroads for the carriage of coal which such railroads purchase as fuel from the mine operators served by your orator.

Under your orator's present regulations and practice it is open to all mines alike to sell coal to any railroad that will buy it. Such coal is usually sold f. o. b. cars at the mine. The foreign railroad having its own cars in which to transport the coal bought for its own use, sends its own cars for that special purpose under such instructions that they cannot be used for any other. They are not distributed upon any system whatever, but are sent directly to the mine to be loaded with the coal that the foreign railroad has purchased from it.

The same conditions apply also to the transportation of coal purchased at the mines by a consumer who has individual cars of his own to send for the coal. It is open to all mines alike to sell coal to such a consumer and thereby obtain the opportunity to load it into the consumer's cars. The use of these consumers' cars, as in the case of the mine operators' own cars, results in an increased transportation expense to the owner of the cars, but the advantages of regularity and control are found by the owners who have successfully used them to offset in their business transactions the increased expense. The foreign railroad must insure itself a steady supply of fuel coal, and the furnace or steel works must have a continuous supply of coal of peculiar quality.

VII

The mining operations of the Rail and River Coal Company, complainant in the said case before the Commission, are located on the operating division known as the Newark division of your orator's system of railroads. In the answer filed by your orator in said case before the Commission it was alleged, was proved by the uncontradicted testimony adduced before the Commission, and was not found to the contrary by the Commission, that on the said Newark division no operator or mine owned or used private coal cars, that the supply of cars to the mining operations of the Rail and River Coal Company was in no way affected in times of car scarcity by the regulations or practice of your orator in respect to said private coal cars, such regulations or practice having no application and nothing to apply to on the Newark division. No other operator on the Newark division or elsewhere was a party to the said case before the Interstate Commerce Commission.

VIII

Your orator is advised, and so states, that the said order of the Interstate Commerce Commission is unlawful, null and void for the following and among other reasons, and in the following and among other particulars, to wit:

First. In that said Commission has assumed and does assume to make and enforce said order on authority of section 15 of the act to regulate commerce as amended by the act passed June 29, 1906, as one contemplated and authorized by said section 15, and assumes and seeks to subject your orator to the penalties provided by section 16 of said act as so amended for failure to obey an order lawfully made under said section 15, whereas in fact and in law said order of the Commission is not an order contemplated or authorized by said section 15 or lawfully issuable thereunder by the said Commission.

Second. In that as to so much of said order as relates to or affects the counting or not counting by your orator of so-called private coal cars belonging to individual operators, the Commission made and issued said decision and order without consideration of the facts legally and properly proved in evidence in the said case before the Commission, and did make and issue said decision and order upon and by reason of an erroneous assumption of law and upon facts alleged to have been found by the Commission from the evidence adduced before it in other proceedings before the Commission, to none of which proceedings your orator was a party. Referring to said private cars and also foreign railway fuel cars the said report of the Commission says:

“Under the defendant’s rules these cars are delivered to the operator to whom they are consigned or manifested, without being charged against his percentage in the general distribution. And these practices the complainants insist are discriminatory in their results and therefore unlawful. These questions have been presented and elaborately argued before the Commission in other proceedings, and have had exhaustive and careful consideration. They will not, therefore, be further considered in connection with this complaint. It will suffice to say, in accordance with the announcement made in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* (12 I. C. C., 398), that the view of the Commission is that the practice of the defendant in not charging private or individual cars against the percentages of the operators receiving them is unlawful and that such operators are not entitled in the general distribution of available cars to receive their respective proportions of the system cars in addition to their private cars. A like ruling must be made with respect to foreign railway fuel cars.”

Third. In that as to so much of said order as relates to or affects the counting or not counting by your orator of foreign railway fuel cars consigned to individual operators, the Commission made and issued said decision and order without consideration of the facts legally and properly proved in evidence in the said case before the Commis-

sion, and did make and issue said decision and order upon and by reason of an erroneous assumption of law and upon facts alleged to have been found by the Commission from the evidence adduced before it in other proceedings before the Commission, to none of which proceedings your orator was a party.

Fourth. In that the said Commission erred in holding or deciding that your orator was or is in and by its present regulations or practices mentioned in said order doing anything unlawful, and in ordering and requiring your orator to abstain from maintaining and enforcing with respect to interstate shipments of coal its present practice or regulation referred to in said order.

Fifth. In that the said Commission erred in requiring in and by the said order that your orator establish with respect to interstate shipments of coal a practice or regulation specified in said order. By establishing, maintaining and enforcing such a practice or regulation as that so specified your orator would in fact violate the provisions of the third section of the act to regulate commerce by making, creating and giving undue and unreasonable preferences and advantages, and undue and unreasonable prejudices and disadvantages as between shippers of coal in interstate commerce over its lines of railroad contrary to the provisions of such section.

IX

Your orator further shows section 16 of said act to regulate commerce as amended contains the following provision:

“Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

“The forfeiture provided for in this act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.”

The said unlawful order of the Commission, made and promulgated by it as aforesaid in assumed exercise of an authority unlawfully claimed by the Commission under section 15 of said act, will, unless the same be enjoined, set aside, annulled or suspended by this honorable court, subject your orator to a multiplicity of suits for heavy

penalties under the above quoted provisions of said section 16 of said act. Compliance by your orator with the requirements of said unlawful order, even temporarily pending final adjudication herein of the lawfulness of the same, will not only, as already hereinbefore stated, deprive your orator of the benefit of its respective appeals and super-sedeas and of the judgment of this court in its favor, but will upon the final judgment of this court in said cause that said order is unlawful, null and void, or at any time before such final judgment, render your orator liable to actions for damages by any and all coal operators on its lines of railroad who own private coal cars or who have made contracts with foreign railroad companies or other consumers for the loading of consumers' cars, and not only will your orator be subjected to a multiplicity of suits on this account, but your orator will be without any means of reparation for the losses sustained by it thereby.

Wherefore, your orator prays that a preliminary or interlocutory order of injunction may be entered suspending the order of the said Interstate Commerce Commission and restraining the said Interstate Commerce Commission from taking any steps or instituting any proceedings to enforce said order, until the final determination of this cause, and that upon a final hearing of this cause a decree be entered herein enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and perpetually enjoining the enforcement of said order.

Your orator further prays that, if any delay shall intervene between the filing of this bill and the issuance of a preliminary or interlocutory order of injunction as prayed for herein, an order be issued herein suspending the order of the Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the preliminary or interlocutory order prayed for herein.

Your orator further prays that such other and further relief be granted in the premises as justice and equity may require.

Your orator further prays that your honors may grant unto your orator a writ of subpoena of the United States of America directed to the Interstate Commerce Commission, commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before your honors in this honorable court and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide such order and de-

cree herein as to your honors shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray, etc.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

By

Solicitor for Complainant.

(Usual verification).

No. 15.—*Order why injunction should not issue*^a

(CAPTION)

In reading the bill filed herein by the above-named complainant against the above-named defendants on the day of, 190.., the affidavit of and the affidavit of, each verified on the day of, 190.., and the papers and documents annexed to said bill and affidavits as referred to therein, it is by the court this day of, 190...

Ordered, That the defendants, the Interstate Commerce Commission, and and, show cause before this court, at a term thereof appointed to be held in the city of, State of, on the day of, 190.., at o'clock a. m., on that day, or as soon thereafter as counsel can be heard, why an injunction should not issue herein enjoining and restraining the defendants and their, and each of their, officers, attorneys, agents, servants, and assistants during the pendency of this action and until the further order of the court therein, from in any manner enforcing or attempting to enforce the order of the Interstate Commerce Commission, dated the day of, 190.., against this complainant and in favor of the said and, and from beginning or attempting to begin any action or proceeding for the purpose of enforcing or attempting to enforce the said order, or compelling or obliging the complainant herein to allow the delivery of oil in tank cars at its Clymer street terminal, or of compelling or obliging this complainant to establish and maintain a regulation rescinding its regulation dated the day of, 190.., prohibiting the delivery of oil in tank cars at its Clymer street, Brooklyn, terminal, and providing for the delivery of petroleum, particularly in tank cars, at its said Clymer street, Brooklyn, terminal.

That a copy of this order and of the said bill, affidavits, and papers be served upon the defendant, the Interstate Commerce Commission,

^a From *D. L. & W. R. Co. v. I. C. C.*, Circuit Court, Southern District of New York, June, 1907 (155 Fed., 512).

either personally on the Chairman, or the Secretary of the said Commission, or by depositing the said papers in a postpaid envelope in the general post office in the city of, directed to the said Interstate Commerce Commission at its address, American National Bank Building, No. 1317 F street northwest, Washington, D. C., and upon the defendants and personally, or upon their attorney,, personally, or by leaving the same at his office, No. street, city of, with a person of suitable age and discretion, on or before the day of, which said service is hereby declared sufficient.

.

United States Circuit Judge.

No. 16.—*Form of notice of application for an order*¹

In the Circuit Court of the United States for the District of

.

A.	B.	RAILWAY COMPANY,	}
		v.	
INTERSTATE	COMMERCE	COMMISSION	
and E.	F.	and G.	
H.,	doing business under the		
		firm name of F. & Company.	

To the defendants:

You are further notified that if any delay intervenes in the issuance of the said temporary or interlocutory order by said court on the day of, 190., the complainants in said suit will at said time and place pray the issuance of an order suspending the above-mentioned order entered by you, and enjoining its enforcement until the hearing and final determination of the said application for a temporary or interlocutory order, as aforesaid.

D. E.,

Solicitor for Complainants.

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(Address)

¹ Adapted from *A. B. Stickney v. I. C. C.*, in the Circuit Court of the United States within and for the District of Minnesota, May, 1908.

No. 16a.—*Notice of passage of order*

SIRS: Please take notice of an order duly made herein by the Honorable, United States circuit judge for the District of, on the day of, 190., with a copy of which said order and the papers upon which it was granted, you are herewith served.

.....
Solicitor for Complainant.

To the INTERSTATE COMMERCE COMMISSION,
Washington, D. C.

No. 17.—*Notice of order, why injunction should not issue*^a

(CAPTION)

To the Interstate Commerce Commission:

You are hereby notified that in the above-entitled cause a bill has been filed in the Circuit Court of the United States for the District of, wherein the above-named complainants pray a decree of said court, setting aside and annulling that certain order entered by you, the said Interstate Commerce Commission, on or about the day of, 190., in that certain proceeding then pending before you known as No., wherein the association were complainant and the Railway Company and the Railroad were respondents.

You are hereby notified that on the day of, 190., at 10 o'clock in the forenoon, before the said Court, at the Federal court room in the city of, State and District of, the complainants in said suit will apply to said Court for a temporary or interlocutory order suspending the above order entered by you, as aforesaid, and enjoining the enforcement thereof, said application to be based upon the bill of complainant, duly verified, a copy of which is attached hereto.

^a Adapted from the *D. L. & W. R. Co. v. I. C. C.*, in the Circuit Court of the United States for the Southern District of New York, June, 1907.

RULES OF PRACTICE BEFORE THE COMMISSION

(Revised, amended, and adopted April 9, 1908)

I.—*Public sessions*¹

The general sessions of the Commission for hearing contested cases, including oral argument, will be held at its office in the American Bank Building, No. 1317 F street NW., Washington, D. C., and the two weeks beginning with the first Monday in each month are set aside for that purpose.

Special sessions may be held at other places as ordered by the Commission.

II.—*Parties to cases*²

Any person, firm, company, corporation, or association, mercantile, agricultural, or manufacturing society, body politic or municipal organization, or any common carrier, or the railroad commissioner or commission of any State or Territory, may complain to the Commission by petition, of anything done, or omitted to be done, in violation of the provisions of the act to regulate commerce by any common carrier or carriers or other parties subject to the provisions of said act. Where a complaint relates to the rates, regulations, or practices of a single carrier, no other carrier need be made a party, but if it relates to matters in which two or more carriers, engaged in transportation by continuous carriage or shipment, are interested, the several carriers participating in such carriage or shipment are proper parties defendant.

Where a complaint relates to rates, regulations, or practices of carriers operating different lines, and the object of the proceeding is to secure correction of such rates, regulations or practices on each of said lines, all the carriers operating such lines must be made defendants.

When the line of a carrier is operated by a receiver or trustee, both the carrier and its receiver or trustee should be made defendants in cases involving transportation over such line.

Persons or carriers not parties may petition in any proceeding for leave to intervene and be heard therein. Such petition shall set forth the petitioner's interest in the proceeding. Leave granted on such application shall entitle the intervener to appear and be treated as a party to the proceeding, but no person not a carrier who intervenes in behalf of the defense shall have the right to file an answer or otherwise become a party, except to have notice of and appear

¹ See section 15.

² As to parties complainants, see section 95; parties defendant, see section 99; interveners, see section 103.

at the taking of testimony, produce and cross-examine witnesses, and be heard, in person or by counsel, on the argument of the case.

III.—*Complaints*³

Complaints must be by petition setting forth briefly the facts claimed to constitute a violation of the law. The name of the carrier or carriers complained against must be stated in full, and the address of the petitioner, with the name and address of his attorney or counsel, if any, must appear upon the petition. The petition need not be verified. The complainant must furnish as many copies of the petition as there may be parties complained against to be served and three additional copies for the use of the Commission.

The Commission will cause a copy of the petition, with notice to satisfy or answer the same within a specified time, to be served personally or by mail, in its discretion, upon each defendant.

IV.—*Answers*⁴

A defendant must answer within twenty days from the date of the notice above provided for, but the Commission may, in a particular case, require the answer to be filed within a shorter time. The time prescribed in any case may be extended, upon good cause shown, by the Commission. The original answer must be filed with the secretary of the Commission at its office in Washington, and a copy thereof at the same time served by the defendant, personally or by mail, upon the complainant, who must forthwith notify the secretary of its receipt. The answer must specifically admit or deny the material allegations of the petition, and also set forth the facts which will be relied upon to support any such denial. If a defendant shall make satisfaction before answering, a written acknowledgment thereof, showing the character and extent of the satisfaction given, must be filed by the complainant, and in that case the fact and manner of satisfaction, without other matter, may be set forth in the answer. If satisfaction be made after the filing and service of an answer, such written acknowledgment must also be filed by the complainant, and a supplemental answer setting forth the fact and manner of satisfaction must be filed by the defendant.

V.—*Notice in nature of demurrer*⁵

A defendant who deems the petition insufficient to show a breach of legal duty may, instead of answering or formally demurring, serve

³ For the essential allegations in a complaint, see sections 74, 75, 76; for forms of complaints, see Appendix.

⁴ For practice relating to answer, see sections 104-108.

⁵ See section 106.

on the complainant notice of hearing on the petition; and in such case the facts stated in the petition will be deemed admitted. A copy of the notice must at the same time be filed with the secretary of the Commission. The filing of an answer, however, will not be deemed an admission of the sufficiency of the petition, but a motion to dismiss for insufficiency may be made at the hearing.

VI.—*Service of papers*^o

Copies of notices or other papers must be served upon the adverse party or parties, personally or by mail, and when any party has appeared by attorney service upon such attorney shall be deemed proper service upon the party.

VII.—*Amendments*^r

Upon application of any party, amendments to any petition or answer, in any proceeding or investigation, may be allowed by the Commission, in its discretion.

VIII.—*Adjournments and extensions of time*

Adjournments and extensions of time may be granted upon the application of any party, in the discretion of the Commission.

IX.—*Stipulations*

The parties to any proceeding or investigation before the Commission may, by stipulation in writing filed with the secretary, agree upon the facts, or any portion thereof, involved in the controversy, which stipulation shall be regarded and used as evidence on the hearing. It is desired that the facts be thus agreed upon whenever practicable.

X.—*Hearings*^s

Upon issue being joined by the service of an answer or notice of hearing on the petition, the Commission will assign a time and place for hearing the case, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless their testimony be taken or the facts be agreed upon as provided for in these rules. The complainant must in all cases establish the facts alleged to constitute a violation of the law, unless the defendant admits the same or fails to answer the petition. The defendant must also prove facts alleged in the answer, unless

^o See sections 109, 115, 118.

^r See section 85.

^s See section 114.

admitted by the petitioner, and fully disclose its defense at the hearing.

In case of failure to answer, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.

Cases may be heard by one or more members of the Commission, or by a special agent or examiner, as ordered by the Commission. When testimony is directed to be taken by a special agent or examiner, such officer shall have power to administer oaths, examine witnesses, and receive evidence, and shall make report thereof to the Commission.

All cases shall be orally argued in Washington, D. C., or submitted upon briefs, unless otherwise ordered by the Commission.

XI.—*Depositions**

The testimony of any witness may be taken by deposition, at the instance of a party, in any case before the Commission, and at any time after the same is at issue. The Commission may also order testimony to be taken by deposition, in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any authorized special agent or examiner of the Commission, judge of any court of the United States, or any commissioner of a circuit or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties or otherwise interested in the proceeding or investigation. Reasonable notice must be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition, and a copy of such notice shall be filed with the secretary of the Commission.

When testimony is to be taken on behalf of a common carrier in any proceeding instituted by the Commission on its own motion, reasonable notice thereof in writing must be given by such carrier to the secretary of the Commission.

Every person whose deposition is taken shall be cautioned and sworn (or may affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing, which may be typewriting, by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the witness.

* See section 143.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the secretary. All depositions must be promptly filed with the secretary.

XII.—*Witnesses and Subpoenas*¹⁰

Subpoenas requiring the attendance of witnesses from any place in the United States to any designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Commission, or an authorized special agent or examiner of the Commission, or by deposition, will, upon the application of either party, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission.

Subpoenas for the production of books, papers, or documents (unless directed to issue by the Commission upon its own motion) will only be issued upon application in writing; and when it is sought to compel witnesses, not parties to the proceeding, to produce such documentary evidence, the application must be sworn to and must specify, as nearly as may be, the books, papers, or documents desired; that the same are in the possession of the witness or under his control; and also by facts stated, show that they contain material evidence necessary to the applicant. Applications to compel a party to the proceeding to produce books, papers, or documents need only set forth in a general way the books, papers, or documents desired to be produced, and that the applicant believes they will be of service in the determination of the case.

Witnesses whose testimony is taken orally or by deposition, and the magistrate or other officer taking such depositions, are severally entitled to the same fees as are paid for like services in the courts of the United States, such fees to be paid by the party at whose instance the testimony is taken.¹¹

XIII.—*Documentary evidence*¹²

Where relevant and material matter offered in evidence is embraced in a report, tariff, rate sheet, classification, book, pamphlet, written or printed statement, or document of any kind containing other matter not material or relevant and not intended to be put in evidence,

¹⁰ See Chapter VII.

¹¹ Fees of witnesses are fixed by law at \$1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom. (See section 145.)

¹² See section 139.

such report, etc., in whole, shall not be received or allowed to be filed in a cause on hearing before this Commission or at any time during the pendency thereof, but counsel or other party offering the same shall also present in convenient and proper form for filing a copy of such material and relevant matter, and that only shall be received and allowed to be filed as evidence and made part of the record in such cause; provided, however, that, if practicable, such matter may be read and taken down by the reporter and thus made part of the record.

XIV.—*Briefs*¹³

Unless otherwise specially ordered, printed briefs shall be filed on behalf of the parties in each case. The brief for complainant and the brief or briefs for the defense shall contain an abstract of the evidence relied upon by the party filing the same, and in such abstract reference shall be made to the pages of the record wherein the evidence appears. The abstract of evidence shall follow the statement of the case and precede the argument. Briefs shall be filed with the Commission and served upon the adverse party or parties by the complainant within fifteen days after the taking of testimony has been concluded, by the defendant or defendants within ten days thereafter, and the complainant shall have five days' additional time for reply. A shorter time or different apportionment not involving greater time may be specially ordered in any case.

Briefs shall be printed in 12-point type, on antique finish paper, 5½ inches wide by 9 inches long, with suitable margins, double-ledged text and single-ledged citations.

Where the case is assigned for oral argument all briefs shall be filed and served at least five days before such argument. All briefs shall be filed with the secretary and shall be accompanied by notice showing service upon the adverse party. Fifteen copies of each brief shall be filed for the use of the Commission.

All parties will be required to comply strictly with this rule, and except for good cause shown no extension will be allowed.

XV.—*Rehearings*¹⁴

Applications for reopening a case after final submission, or for rehearing after decision made by the Commission, must be by petition, and must state specifically the grounds upon which the application is based. If such application be to reopen the case for further evidence, the nature and purpose of such evidence must be briefly stated, and the same must not be merely cumulative. If the application be for

¹³ See section 115.

¹⁴ See section 152.

a rehearing, the petition must specify the findings of fact and conclusions of law claimed to be erroneous, with a brief statement of the grounds of error; and when any decision, order, or requirement of the Commission is sought to be reversed, changed, or modified on account of facts and circumstances arising subsequent to the hearing, or of consequences resulting from compliance with such decision, order, or requirement which are claimed to justify a reconsideration of the case, the matters relied upon by the applicant must be fully set forth.

XVI.—*Printing of pleadings, etc.*

Pleadings, depositions, and other papers of importance shall be printed or in typewriting, and when not printed only one side of the paper shall be used.

XVII.—*Copies of papers or testimony*¹⁵

Copies of any report, decision, order, or requirement of the Commission will be furnished without charge upon application to the secretary by any person or carrier party to the proceeding.¹⁶

One copy of the testimony will be furnished by the Commission for the use of the complainant and one copy for the use of the defendant, without charge; and when two or more complainants or defendants have appeared at the hearing, such complainants or defendants must designate to whom the copy for their use shall be delivered.¹⁷

XVIII.—*Compliance with orders*¹⁸

Upon the issuance of an order against any defendant or defendants, after hearing, investigation, and report by the Commission, such defendant or defendants must promptly notify the secretary of the Commission, upon the date when such order becomes effective, as to whether such defendant or defendants has complied or not with the provisions of said order; and when a change in rates is required, such notice must be given in addition to the filing of a schedule or tariff showing such change in rates.

¹⁵ See section 117.

¹⁶ This rule applies as well to copies of tariffs (if not too lengthy), and other papers requiring the certification of the Secretary of the Commission, in order that they be introduced in evidence before the courts.

¹⁷ By custom the principal complainant and the first named defendant are entitled to copies of the testimony.

¹⁸ For the several kinds of orders, see section 124; for proceedings after order issued, see Chapter VIII.

XIX.—*Applications by carriers under proviso clause of fourth section*¹⁹

Any common carrier may apply to the Commission, under the proviso clause of the fourth section, for authority to charge for the transportation of like kind of property less for a longer than for a shorter distance over the same line, in the same direction, the shorter being included within the longer distance. Such application shall be by petition, which shall specify the places and traffic involved, the rates charged on such traffic for the shorter and longer distances, the carriers other than the petitioner which may be interested in the traffic, the character of the hardship claimed to exist, and the extent of the relief sought by the petitioner. Upon the filing of such a petition, the Commission will take such action as the circumstances of the case seem to require.

XX.—*Information to parties*

The secretary of the Commission will, upon request, advise any party as to the form of petition, answer, or other paper necessary to be filed in any case, and furnish such information from the files of the Commission as will conduce to a proper presentation of facts material to the controversy.

XXI.—*Address of the Commission*

All complaints concerning anything done or omitted to be done by any common carrier, and all petitions or answers in any proceeding, or applications in relation thereto, and all letters and telegrams for the Commission, must be addressed to Washington, D. C., unless otherwise specially directed.

¹⁹ See section 121.

METHODS OF ASCERTAINING COST OF CARRIAGE

The purpose of this paper is to consider the several methods which have been used by tribunals to ascertain the cost of transporting freight—that cost being the cost to the carrier.

It is assumed, first of all, that charges for transportation should bear some relation to the cost of transportation. What this relation shall be, and whether or not cost shall exceed charges or vice versa, we shall not now attempt to concern ourselves with; we simply assume the fact that some relation should exist between these figures when ascertained.

It may be argued that, from a legal point of view, the cost of transporting goods having been once obtained, we are scarcely wiser than before. The Supreme Court of the United States has held that as a matter of law, it is improper, in considering the reasonableness of a rate, to make a comparison of the intra-state rates of two States, and it is likewise improper, as a matter of law, to compare the intra-state rates of one State with the rates apply on interstate traffic originating in, destined to, or passing through the State which we have under consideration. However this may be as a matter of law, certain it is, that as a matter of business, no stronger argument can be adduced than to show by mathematical process that the rates of one State are greater or less than those of another, or that the local State rates are very much more than the interstate rates for traffic which, in its transit, enters the State one may be considering (*Smith v. Ames*, 169 U. S., 466).

We shall further assume that there has been determined and crystalized into currency, what we mean by the term "fair valuation" of the carrier's property. We are supposed to have agreed to consider some figure which may not be entirely dependent upon any one, but in fact an inference, if you please, from all of the following items: the cost of construction, the cost of reproduction, the valuation as a going concern, the valuation of the services of the intreprenuer; in short, we have placed in figures the "fair valuation" of the carriers' property in accordance with the rules of law, the demands of justice, and the requirements of good business.¹

¹ The "fair valuation" of the carrier's property must be taken into consideration in determining the reasonableness of its rates and charges. The elements which must be taken into consideration to ascertain the "fair valuation" have been named by the Supreme Court, but no definite mathematical rule by which to crystalize the "fair valuation" into currency has as yet been expressed. The elements are to be found in *Smyth v. Ames* (169 U. S., 466). Upon the general subject concerning the necessity for considering the "fair valuation" of property as an element of reasonable charges, see *Lindsley: "Rate Regulation of Gas and Electric Lighting."*

One other assumption, and that is that the carrier has given us upon oath such testimony as we shall have called for.

It should be remembered in considering this matter that cases involving the cost of traffic to the carrier may take either one or two forms, namely, of the schedule as a whole, or of a particular commodity. If we consider the schedule as a whole, we must perforce conclude that we have simply arrived at the beginning when we get our final figures, for we shall then be compelled to determine what relation each of the 8,000 articles in the classification shall bear to this average cost. If, on the contrary, we consider the cost of transporting a particular article, we shall then be under the necessity of determining what relation should subsist between the charges to be made for transporting this particular article and the cost of its transportation, and, if we are to aim at completeness, the relation between the cost of transporting this article and others or the relative charge to be made for them.

Cases requiring the ascertainment of the cost of transporting freight per unit arise in one of two ways; either a statute or an order of a railroad commission has prescribed a schedule of rates or a preliminary investigation to ascertain the cost precedes the making of such a schedule.

One of the earliest cases in which it was attempted to ascertain the cost of transportation was the case of *Smyth v. Ames* (169 U. S., 466).

In that case the legislature of Nebraska had prescribed a schedule of rates applicable to the State tonnage moved upon all the carriers operating within that Commonwealth. The facts before the courts were as follows: By expert testimony it was said that the legislature-made rates reduced the charges upon freight traffic $29\frac{1}{2}$ per cent.; it was in evidence from expert witnesses that the cost of moving the purely intrastate traffic was from 10 to 25 per cent. more than the cost of moving the interstate traffic, the court assumed that 10 per cent. increase was a reasonable one; figures were introduced showing operating expenses and receipts, number of passengers carried, the tons of freight, and the mileage over which freight was transported.

With such evidence at hand, after separating the passenger traffic from the freight traffic, the court used the following method: Dividing the cost of freight operation by the receipts from freight operation, a result was produced of 66.24. These figures (66.24) were said to show the percentage which the operating expenses bore to the receipts upon all the traffic carried by the railroad, and hence represented the cost of carrying. As the evidence showing that the cost of doing the intrastate freight business exceeded the cost of doing all the business 10 per cent., this last figure was added to the quotient

heretofore obtained, making a total of 76.24. The legislature-made rates would reduce (according to the testimony) the receipts 29½ per cent. That is to say, for each \$100 of receipts, if it be assumed that the quantity of tonnage will not change (and the court made such assumption) the carrier would receive \$70.50. Thus, under the legislature-made rates (and it being assumed that there would be no increase in tonnage) the carrier would expend in operating expenses \$76.24 and receive in return \$70.50. Of course, upon such a basis the court held the legislature-made rates of Nebraska unconstitutional, for the proposed rates would not be remunerative.

The fallacy of the mathematics of this case can be seen from two points, even if we concede that there will be no increase or decrease in the yearly tonnage by reason of the change of rates or commercial conditions.

1. The percentage which the operating expenses bear to the receipts does not mean anything; it simply shows the relation between the two items; they both might be relatively high or low, or one or the other may be entirely disproportionate to fairness or good management or justice.

2. Again, a careful consideration of the exhibits in the case shows the prospective effect of the proposed reduction of rates upon several carriers. If this change of rates produces a reduction for one carrier, it is fair to conclude that it must produce a reduction for another. And so, if it produce a reduction for one carrier in a single year, it must produce a reduction for that carrier every year. Such, however, is not found to be the case. For example, the Fremont Company was shown, had this reduction of rates been applied in 1891, to have gained, while seven other roads would have lost; and, in 1892, the Fremont Company would have lost with five other companies, and the Union Pacific (which had been a loser the year before) would become a gainer; further, the Fremont Company in 1893 shifts to the other side of the line, becoming a gainer and holding the Union Pacific with it, while five other companies still remain losers.²

Thus, it clearly appears that there must be some error in the mathematical method of this case.

² The statistics cover three years, 1891, 1892, and 1893. The companies were the Burlington, St. Paul, Fremont, Union Pacific, Omaha, St. Joseph, Kansas City. In 1891, had the earnings under the law been reduced, according to the expert testimony (29½ per cent.) the several companies would have lost from 5.74 per cent. to 59.76 per cent., except the Fremont Company, which would have gained 10.63 per cent. In 1892, the several companies would have lost from 3.73 per cent. to 32.62 per cent., except the Union Pacific Company, which would have gained 4.06 per cent. (the year before this company would have lost 8.44 per cent.). In 1893, the several companies would have lost from 1.55 per cent. to 33.64 per cent., except the Fremont Company and the Omaha Company, the former gaining 6.84 per cent. and the latter 1.99 per cent. The table in full is to be found in 169 U. S., 535.

The Supreme Court had occasion to consider the cost of transportation in the so-called South Dakota Case (*C. M. & St. P. R. Co. v. Tompkins*, 176 U. S., 171). In that case a schedule of rates had been prescribed by the railroad commission of South Dakota. Here the circuit court assumed that for succeeding years the tonnage carried by the railroads would remain substantially the same, and it undertook to separate the passenger and freight business, and found from the testimony that the gross receipts from passenger business, had the legislature-made rates been in effect, would be reduced 15 per cent., and a reduction in freight charges would have diminished the gross receipts from that source by 17 per cent. It was also found that the cost of doing the business, as expressed in the term "operating expenses," would be practically the same. The court below found the value of the particular carrier's (*C. M. & St. P. R. Co.*) property in South Dakota to be \$10,000,000,³ but it was held that it was not fair to consider that sum as employed in doing the local business, for the same property was employed in doing the interstate business. The court below also found that the true way to determine the value of the property which is employed in the local business was to divide the total valuation of \$10,000,000 according to the proportion that existed between the amount of gross receipts from the interstate and from the local business, both of which amounts were accurately stated.⁴ Upon this basis of division it was found that the value of the property employed in local business in a particular year⁵ was \$1,900,000; dividing this amount by the gross receipts from local business, it was ascertained that these receipts represented 16.03 per cent. of the valuation. The court then proceeded upon the supposition that the commission's schedule of rates had been enforced during the year it had been considering. Taking the supposed reduced earnings, it found that the valuation of the carrier's road engaged in the local business would have been \$1,600,000, and upon such basis that the gross receipts from local business (under revised schedules) would have amounted to 16.02 per cent. of the valuation of the property. As a matter of law, it was held that the variation of percentage was not sufficient to justify a declaration that the reduced rates prescribed by the commission were unreasonable; in short, the court below was of the opinion that the earning capacity of the road was so slightly reduced that it could not be affirmed that the new rates were unreasonable.

Commenting upon this method the Supreme Court of the United States suggests that there must be some fallacy in it, for the reason

³ This fact was found by the court below, notwithstanding evidence to the effect that it was bonded for over \$19,000,000.

⁴ The receipts from local and interstate business were ascertained from the testimony of the carrier.

⁵ The court considered the effect of the statute for four years.

that while the new schedule would reduce the actual receipts on freight business 17 per cent., the earning capacity was diminished only one-tenth of 1 per cent. "Such a result," says the court, "indicates that there is something wrong in the process by which the conclusion is reached." To show the fallacy of this method and attempt to ascertain the cost of transportation, the court took round numbers:

Suppose the total value of the property in South Dakota was \$10,000,000, and the total receipts from both interstate and local business were \$1,000,000, one-half from each. Then, according to the method pursued by the trial court, the value of the property used in earning local receipts would be \$5,000,000, and the per cent. of receipts to value would be 10 per cent. The interstate receipts being unchanged, let the local receipts by a proposed schedule be reduced to one-fifth of what they had been, so that instead of receiving \$500,000 the company only receives \$100,000. The total receipts for interstate and local business being then \$600,000, the valuation of \$10,000,000, divided between the two, would give to the property engaged in earning interstate receipts in round numbers \$8,333,000, and to that engaged in earning local receipts \$1,667,000. But if \$1,667,000 worth of property earns \$100,000 it earns 6 per cent. In other words, although the actual receipts from local business are only one-fifth of what they were, the earning capacity is three-fifths of what it was. And turning to the other side of the problem, it appears that if the value of the property engaged in interstate business is to be taken as \$8,333,000, and it earned \$500,000, its earning capacity was the same as that employed in local business—6 per cent. So that although the rates for interstate business be undisturbed, the process by which the trial court reached its conclusion discloses the same reduction in the earning capacity of the property employed in interstate business as in that employed in local business, in which the rates are reduced. Again, in another way, the error of the court's computation is manifested. The testimony discloses that the operating expenses of the entire system during each of the four years were over 60 per cent. of the gross receipts. If the cost of doing local business in South Dakota was the same as that of doing the total business of the company, then the net earnings of that local business would not exceed 40 per cent. of the gross receipts. Reduce the gross receipts 15 per cent.—and the reduction by the defendants' rates was 15 per cent. on passengers and 17 per cent. on freight business—it would leave only 25 per cent. of the gross receipts, as what might be called net earnings, to be applied to the payment of interest on bonds and dividends on stock. But the testimony shows that the cost of doing local business is much greater than that of doing through business. If it should be 85 per cent. of the gross receipts (and there was testimony tending to show that it was as much if not more) then a reduction of 15 per cent. in the gross receipts would leave the property earning nothing more than expenses of operation. These computations show that the method which the court pursued was erroneous, and that without a finding as to the cost of doing the local business it is impossible to determine whether the reduced rates prescribed by defendants were unreasonable or not.*

In a recent case⁷ before the Kentucky Railroad Commission, an at-

*The decree of the trial court dismissing a bill to restrain the enforcement of a schedule of maximum rates was reversed, but the court in its opinion recommended that the testimony should be referred to some competent master, general or special, to make finding of facts.

⁷The Commonwealth of Kentucky v. the L. & N. R. Co., before the Railroad Commission of Kentucky, 1906.

tempt was made to arrive at an approximation of the cost to a carrier for doing the freight service in that State during the year 1905 upon a ton-mile basis. It was in evidence from the carrier what amount of the money was properly chargeable to the intrastate freight traffic. This was separated by the carrier into two parts, one chargeable to haulage or transportation and the other to services other than haulage or transportation, such as terminal charges. It was decided that the total of the amount chargeable for haulage is fairly apportionable between intra and inter state freight upon the basis of total ton-miles. The charges for services other than haulage or transportation was said to be fairly apportionable between each of the two classes of freight based upon the number of tons. The carrier having given figures as to the average length of haul of interstate and intrastate freight, the amount chargeable to charges other than for haulage was divided by the number of tons (inter plus intra state) and this was found to give an average charge per ton for station loading and unloading, advertising, damage, and, in fact, all services except haulage of 16.25 cents per ton. This amount was then divided by the average haul of the State traffic and produced a result of 0.1659 cent. In order to secure a comparison between the inter and intra state traffic the average charge per ton was divided by the average haul of interstate freight, producing a result of 0.1092 cent. That is to say, by reason of the difference between the number of tons of State traffic and the number of tons of interstate traffic hauled by the carrier, and the variation in the length of haul between these two kinds of traffic, there is chargeable for expenses other than haulage 0.1659 cent on the local traffic and 0.1092 cent on the inter state traffic.*

The commission then proceeded to ascertain the cost per ton-mile for haulage. This was accomplished by dividing the operating expenses for the State traffic by the number of ton-miles of State traffic, which produced a haulage charge per ton mile of 0.3884 cent. To this amount chargeable for haulage (0.3884 cents) was added the cost for charges other than haulage (0.1659 cent) producing the fair estimated cost of all service for State traffic per ton-mile, 0.5543 cent. By the same method the interstate cost for haulage was found to be 0.4976 cent per ton-mile. That is to say, the cost of haulage was estimated to be the same upon State traffic as upon interstate traffic, while the cost for stations and other services except haulage, is more upon intra than upon inter state traffic.*

At this point the Kentucky Railroad Commission approached the

* The expenses for terminal charges, damage, advertising, etc., were therefore 51 per cent. more on intra-state traffic than on interstate traffic.

* The total cost upon the ton-mile basis on intra-state traffic as found in this case is 11.4 per cent. more than on interstate traffic.

serious question of the value of the physical property within the State and the amount of money which ought to be earned upon it. The commission having been furnished by the carrier the physical value of the property and having ascertained the rate of interest which securities of this kind are accustomed to produce, the quotations on stocks and bonds being considered, it remained to ascertain how the fair valuation should be divided so that one portion of it should produce adequate revenue from State freight and another portion produce revenue from interstate freight. The first proposition is to separate this valuation into freight and passenger business. While the Kentucky commission assumes that this separation must be made, it does not seem to have done so. Having determined the proper total amount to be earned by the carrier, from both inter and intra state business, it attempts to ascertain what shall be used as a basis for dividing this fund equitably as between the two kinds of traffic. "Certainly neither gross earnings nor net earnings can be a satisfactory basis of apportionment of these charges for this purpose, particularly where the purpose of apportionment is to determine the propriety of the rates from which gross earnings and net earnings result. In this case the earnings result from the rates in question. This annual charge for valuation is in a sense part of the carrier's cost, and to attempt to justify the apportionment of costs by the earnings resulting from rates, and then to justify the rates by the apportionment of costs based on the earnings resulting from the rates, would clearly be reasoning in a circle. Nor can any suitable basis for apportionment of this annual charge on account of valuation be derived from transportation statistics relating to passengers and freight, for the obvious reason that there is no common transportation unit, except the train-mile or car-mile, and the use of the train-mile or car-mile would give no help in apportioning between State freight and interstate freight, because no trains are devoted solely to either class of freight, nor is any considerable number of cars assigned exclusively to either class of freight.

"Plainly, then, we have left only the operating expenses as a basis of apportionment."

Having determined that the operating expenses are the only available basis for apportionment, and being in possession of the operating expenses for both State and interstate traffic and of the amount of money which would be needed to pay interest, it ascertained that the interest fund was 43.95 per cent. of the cost of operation. It then took the operating expenses chargeable against State freight which it multiplied by 43.95 to ascertain how much money should be derived from the State business in order to contribute to the interest fund;

that contribution was found to be \$542,744. This sum was added to the State operating expenses and was held to represent the fair amount which the carrier should receive from State traffic because it included the two elements of actual cost of operation and a surplus with which to pay interest.

Commenting upon its own method the commission said:

"The commission does not, of course, undertake to say that the computations, the results of which are hereinbefore set forth, are mathematically accurate, for it is universally conceded that any exact statement of the cost to a carrier for performing its freight service as compared with its passenger service, or for performing a part of the freight service as compared with the remainder, can not be made. The commission has merely done the best it could with the figures and facts before it, but it has endeavored in all its computations to make the most liberal allowance for actual valuation. Yet, with all this, we have a result showing charges by this carrier for intrastate traffic, within the State of Kentucky, which are more than \$774,000, in excess of just and reasonable rates."¹⁰

From the adjudicated court cases it seems reasonably certain that the method used by the Supreme Court in *Smyth v. Ames* is inaccurate, for the relation which operating expenses bear to gross receipts does not and can never show the cost of transporting the commodities. The method used by the Circuit Court of the United States for the District of South Dakota could not stand the tests applied by the Supreme Court of the United States, which tests, it will be recalled, were different from the method formally used by that tribunal. The method used by the Kentucky Railroad Commission is clearly more elaborate if not more correct, than those to which reference has been made by the Supreme Court.

While the method of the Kentucky Railroad Commission is most elaborate, yet to determine with mathematical accuracy the cost of traffic, a definite method has not as yet been devised. The difficulty is two-fold. First, on the one line of road, with a single equipment, two kinds of traffic are carried. How is the capital to be separated for the purpose of producing revenue upon these two kinds of traffic. Again, the method used by the Kentucky commission considers the whole schedule of rates, rates in gross, and secures its results in figures per ton per mile. In short, in the same focus it takes a broad survey of all kinds of commodities in the two kinds of traffic, and microscopically looks at the smallest possible unit of measurement.

¹⁰ For the Louisville and Nashville Railroad and some other carriers, the Commission prescribed a schedule of rates based upon these findings. The schedule covers 17 classes and distances from 10 miles and less to 450 miles (by 5 mile steps to 100 miles, and by 10 mile steps to 250 miles, and by 25 mile steps to 450 miles).

The shipment of a box of books is augmented to per ton per mile; a shipment of a carload or trainload of vegetables is reduced to the same unit. While this unit may be used in mathematics, it can be confidently asserted that it rarely, if ever, enters the head of a traffic manager making rates; ordinarily he does not consider the cost of traffic, for he does not know it.

The difficulties in this matter seem to be the unwarranted assumptions, within which there might be such a variation as to cause rates (single or as a schedule) to be unreasonably low on the one hand or extortionate on the other. The assumption that the future quantity of traffic will remain the same,¹¹ the assumption that the average haul of both inter and intra state traffic will not be materially different, the assumption that operating expenses for a particular year are reasonable, the assumption what shall constitute fair valuation of the carrier's property, the amount of tonnage it will transport, the fair rate of return, the arbitrary rule that all parts of the road cost the same to operate per unit,¹² the equally arbitrary rule that the rate of return ought to be the same for all roads and branches of roads, that the unit of per ton mile is a safe and equitable one, that any unit ought to apply to the 8,000 articles in numerous classes, that terminal expenses are the same for all classes of commodities, that the haul on interstate traffic costs the same as on local traffic, and finally, but by no means unimportant, that the carrier shall give us correct figures. These assumptions heretofore made may and may not be true. Until proven correct, we cannot hope to ascertain to a mathematical certainty the cost of transportation to the carrier by any of the methods considered or one hereafter to be devised.—*Reprinted, by permission, from the Green Bag, March, 1907.*

WASHINGTON, D. C., February, 1907.

¹¹ It was said by Mr. Justice Brewer in *Chicago Grand Trunk Railway Company v. Wellman* (143 U. S., 339), "Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction in rates will increase the amount of business, and, therefore, the earnings?"

These suggestive queries were quoted and approved by Mr. Justice Shiras in *St. L. & S. F. R. Co. v. Gill* (156 U. S., 648).

¹² It is curious to note that a former president of the Louisville and Nashville Railroad analyzed the cost of carrying freight on the main line and on each of the different branches. Mr. Albert Fink summed up as follows: "A careful investigation shows that, under ordinary conditions under which transportation service is generally performed, the cost per ton mile in some instances may not exceed one-seventh of a cent, and in others will be as high as 73 cents per ton mile on the same road." That is to say, the cost may vary from 1 to 500. It is said that the receipts of the Paris and Lyons Company from Paris to Marseilles, about one-eighth of the entire trackage, produces one-half the net earnings of the company.

CORRECT TITLES OF THE LEADING RAILROADS

[Corrected to Sept. 1, 1908.]

Aberdeen and Asheboro Railroad.	Chattanooga Southern Railroad.
Alabama and Vicksburg Railway.	Chesapeake and Ohio Railway.
Alabama Great Southern Railroad.	Chicago and Alton Railroad.
Ann Arbor Railroad.	Chicago and Eastern Illinois Railroad.
Apalachicola Northern Railroad.	Chicago and Erie Railroad.
Arizona and New Mexico Railway Company.	Chicago and Northwestern Railway Company.
Astoria and Columbia River Railway Company.	Chicago, Burlington and Quincy Railroad Company.
Atchison, Topeka and Santa Fe Railway.	Chicago, Cincinnati and Louisville Railroad.
Atlanta and Birmingham Air Line Railway.	Chicago Great Western Railway Company.
Atlanta and West Point Railroad.	Chicago, Indiana and Southern Railroad.
Atlanta, Birmingham and Atlantic Railroad.	Chicago, Indianapolis and Louisville Railway.
Atlantic City Railroad.	Chicago, Kalamazoo and Saginaw Railway.
Atlantic Coast Line Railroad.	Chicago, Lake Shore and Eastern Railway Company.
Augusta Southern Railroad.	Chicago, Milwaukee and St. Paul Railway Company.
Baltimore and Ohio Railroad.	Chicago, Peoria and St. Louis Railway of Illinois.
Baltimore, Chesapeake and Atlantic Railway.	Chicago, Rock Island and El Paso Railway Company.
Bangor and Aroostook Railroad.	Chicago, Rock Island and Gulf Railway Company.
Beaumont and Great Northern Railroad.	Chicago, Rock Island and Pacific Railway Company.
Bellingham Bay and British Columbia Railroad Company.	Chicago, St. Paul, Minneapolis and Omaha Railway Company.
Bessemer and Lake Erie Railroad.	Chicago Southern Railway Company.
Boston and Maine Railroad.	Chicago Terminal Transfer Railroad Company.
Buffalo and Susquehanna Railway.	Cincinnati and Muskingum Valley Railroad.
Buffalo, Rochester and Pittsburg Railway.	Cincinnati, Hamilton and Dayton Railway.
Butte, Anaconda and Pacific Railway.	Cincinnati, New Orleans and Texas Pacific Railway.
Canadian Pacific Railway.	Cincinnati Northern Railroad.
Carolina and Northwestern Railway.	
Carolina, Clinchfield and Ohio Railway.	
Central Branch Railway Company.	
Central Indiana Railway.	
Central of Georgia Railway.	
Central Railroad of New Jersey.	
Central Vermont Railway.	
Charleston and Western Carolina Railway.	

- Cleveland, Akron and Columbus Rail-
 way.
 Cleveland, Cincinnati, Chicago and St.
 Louis Railway.
 Coal and Coke Railway.
 Colorado and Southern Railway Com-
 pany.
 Colorado and Wyoming Railway Com-
 pany.
 Colorado Midland Railway Company.
 Columbia and Puget Sound Railroad
 Company.
 Columbia, Newberry and Laurens Rail-
 road.
 Copper Range Railroad.
 Corvallis and Eastern Railroad Com-
 pany.
 Cumberland and Pennsylvania Railroad.
 Cumberland Valley Railroad.

 Danville and Western Railway.
 Delaware and Eastern Railway.
 Delaware and Hudson Company.
 Delaware, Lackawanna and Western
 Railroad.
 Denver and Rio Grande Railroad Com-
 pany.
 Denver, Northwestern and Pacific Rail-
 way.
 Detroit and Mackinac Railway.
 Detroit, Grand Haven and Milwaukee
 Railway.
 Detroit, Toledo and Ironton Railway.
 Des Moines, Iowa Falls and Northern
 Railway.
 Duluth and Iron Range Railroad.
 Duluth and Northern Minnesota Rail-
 way.
 Duluth and Northeastern Railroad.
 Duluth, Missabe and Northern Railway.
 Duluth, South Shore and Atlantic Rail-
 way.
 Dunkirk, Allegheny Valley and Pitts-
 burg Railroad.

 Eastern Railway of New Mexico.
 Elgin, Joliet and Eastern Railway.
 El Paso and Southwestern Company.
 Erie Railroad.
 Escanaba and Lake Superior Railroad.
 Eureka and Palisade Railway Company.
 Evansville and Indianapolis Railroad.
 Evansville and Terre Haute Railroad.

 Florida Central Railroad.
 Florida East Coast Railway.
 Florida Railway.
 Fonda, Johnstown and Gloversville
 Railroad.
 Fort Smith and Western Railroad Com-
 pany.
 Fort Worth and Denver City Railway
 Company.
 Fort Worth and Rio Grande Railway
 Company.

 Georgia and Florida Railway.
 Georgia Coast and Piedmont Railroad.
 Georgia, Florida and Alabama Railway.
 Georgia Northern Railway of Georgia.
 Georgia Railroad.
 Georgia Southern and Florida Railway.
 Gila Valley, Globe and Northern Rail-
 way Company.
 Grand Canyon Railway Company.
 Grand Rapids and Indiana Railway.
 Grand Trunk Railway of Canada.
 Grand Trunk Western Railway.
 Great Northern Railway.
 Green Bay and Western Railroad.
 Gulf and Interstate Railway Company
 of Texas.
 Gulf and Ship Island Railroad.
 Gulf, Colorado and Santa Fe Railway
 Company.
 Gulf Line Railway.

 Hocking Valley Railway.
 Houston and Texas Central Railroad
 Company.
 Houston East and West Texas Railway
 Company.

 Idaho and Washington Northern Rail-
 road Company.
 Idaho Northern Railway Company.
 Illinois Central Railroad.
 Illinois, Iowa and Minnesota Railway.
 Illinois Southern Railway.
 International and Great Northern Rail-
 road Company.
 Iowa Central Railway.

 Kansas City, Clinton and Springfield
 Railway Company.
 Kansas City, Mexico and Orient Rail-
 way Company.

- Kansas City Southern Railway Company.
 Kansas City Southwestern Railway Company.
 Lake Erie and Western Railroad.
 Lake Shore and Michigan Southern Railway.
 Lancaster and Chester Railway.
 Las Vegas and Tonopah Railroad Company.
 Leavenworth and Topeka Railway Company.
 Lehigh and Hudson River Railway.
 Lehigh and New England Railroad.
 Lehigh Valley Railroad.
 Lexington and Eastern Railway.
 Long Island Railroad.
 Louisiana and Arkansas Railway Company.
 Louisiana and Northwest Railroad Company.
 Louisiana Railway and Navigation Company.
 Louisiana Western Railroad Company.
 Louisville and Atlantic Railroad.
 Louisville and Nashville Railroad.
 Louisville, Henderson and St. Louis Railway.
 Macon and Birmingham Railway.
 Macon, Dublin and Savannah Railroad.
 Maine Central Railroad.
 Manistee and Grand Rapids Railroad.
 Manistee and Luther Railroad.
 Manistee and Northeastern Railroad.
 Manistique Railway.
 Maryland and Pennsylvania Railroad.
 Michigan Central Railroad.
 Midland Valley Railroad Company.
 Minneapolis and St. Louis Railroad.
 Minneapolis, St. Paul and Sault Ste. Marie Railway.
 Minnesota and International Railway.
 Mississippi Central Railroad.
 Mississippi River and Bonne Terre Railway.
 Missouri and North Arkansas Railroad Company.
 Missouri, Kansas and Texas Railway Company.
 Missouri, Oklahoma and Gulf Railway Company.
 Missouri Pacific Railway Company.
 Missouri Southern Railroad Company.
 Mobile and Ohio Railroad.
 Mobile, Jackson and Kansas City Railroad.
 Montana Central Railway.
 Montana Railroad.
 Morgan's Louisiana and Texas Railroad and Steamship Company.
 Munising Railway.
 Nashville, Chattanooga and St. Louis Railway.
 Nevada and California Railway Company.
 Nevada-California-Oregon Railway.
 Nevada Central Railroad Company (The).
 Nevada Northern Railway Company.
 New Orleans Great Northern Railroad.
 Newton and Northwestern Railroad.
 New York and Pennsylvania Railway.
 New York Central and Hudson River Railroad.
 New York, Chicago and St. Louis Railroad.
 New York, New Haven and Hartford Railroad.
 New York, Ontario and Western Railway.
 New York, Philadelphia and Norfolk Railroad.
 New York, Susquehanna and Western Railroad.
 Norfolk and Southern Railway.
 Norfolk and Western Railway.
 Northern Alabama Railway.
 Northern Central Railway.
 Northern Pacific Railway.
 Northwestern Pacific Railroad Company.
 Ohio River and Western Railway.
 Oklahoma Central Railway Company.
 Oregon Railroad and Navigation Company.
 Oregon Short Line Railroad Company.
 Pacific and Idaho Northern Railway Company.
 Pacific Coast Railway Company.
 Pennsylvania Company.
 Pennsylvania Railroad.
 Peoria and Eastern Railway.

- Pere Marquette Railroad.
 Philadelphia and Reading Railway.
 Philadelphia, Baltimore and Washington Railroad.
 Pittsburgh and Lake Erie Railroad.
 Pittsburgh, Cincinnati, Chicago and St. Louis Railway.
 Pittsburg, Shawmut and Northern Railroad.
 Pontiac, Oxford and Northern Railroad.
 Quincy, Omaha and Kansas City Railroad.
 Reading and Columbia Railroad.
 Richmond, Fredericksburg and Potomac Railroad.
 Rio Grande Southern Railroad Company.
 Rutland Railroad.
 St. Joseph and Grand Island Railway.
 St. Johnsbury and Lake Champlain Railroad.
 St. Louis and Hannibal Railway.
 St. Louis and San Francisco Railroad Company.
 St. Louis, Brownsville and Mexico Railway Company.
 St. Louis, Iron Mountain and Southern Railway Company.
 St. Louis, San Francisco and Texas Railway Company.
 St. Louis Southwestern Railway Company.
 St. Louis Southwestern Railway Company of Texas.
 San Antonio and Aransas Pass Railway Company.
 Sandy River and Rangeley Lakes Railroad.
 San Pedro, Los Angeles and Salt Lake Railroad Company.
 Santa Fe Central Railway Company.
 Santa Fe, Prescott and Phoenix Railway Company.
 Seaboard Air Line Railway.
 Southern Indiana Railway Company.
 Southern Kansas Railway Company of Texas.
 Southern Pacific Company.
 Southern Railway.
 South Georgia Railway.
 Spokane, Portland and Seattle Railway Company.
 Susquehanna and New York Railroad.
 Texas and Gulf Railway Company.
 Texas and New Orleans Railroad Company.
 Texas and Pacific Railway Company.
 Texas Central Railroad Company.
 Texas Midland Railroad.
 Texas Mexican Railway Company.
 Texas Southern Railway Company.
 Tidewater and Western Railroad.
 Toledo and Ohio Central Railway.
 Toledo and Western Railroad.
 Toledo, Peoria and Western Railway.
 Toledo, Saginaw and Muskegon Railway.
 Toledo, St. Louis and Western Railroad.
 Tombigbee Valley Railroad.
 Ulster and Delaware Railroad.
 Union Pacific Railroad.
 Vandalia Railroad.
 Vicksburg, Shreveport and Pacific Railway Company.
 Virginia and Southwestern Railway.
 Virginian Railway.
 Wabash Railroad.
 Western Maryland Railroad.
 Western Pacific Railway Company.
 Western Railway of Alabama.
 West Jersey and Sea Shore Railroad.
 Wheeling and Lake Erie Railroad.
 Wichita Valley Railway Company.
 Wisconsin and Michigan Railway.
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 Wyoming and Northwestern Railway.
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